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In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA AND JUAN MIRANDA,

Appellees,

-v-

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant.

ON APPEAL FROM A SPECIAL THREE JUDGE COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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Dated: November 8, 1973

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JURISDICTIONAL STATEMENT

Appellant, an official of the State of Connecticut, appeals from the judgment of A Special Three Judge Court for the District of Connecticut. This Statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction to consider the appeal, and that substantial questions are presented therein.

OPINION BELOW

The decision appealed from is reported in F. Supp. (1973). A copy of said decision appears in the Appendix, beginning at page 1A.

GROUNDS OF JURISDICTION

Suit was instituted in the United States District Court for the District of Connecticut by Larry Steinberg and Cecil Paskewitz, both residents of Connecticut, against Jack A. Fusari, Labor Commissioner of the State of Connecticut, and Administrator, Unemployment Compensation Act, to determine whether procedures authorized by certain Connecticut statutes violate the "payment when due" provision of the Social Security Act, 42 U.S.C. § 503 (a) (1), and deny plaintiffs' their Fourteenth Amendment right to due process of law. The action was brought pursuant to 42 U.S.C. § 1983.

The District Court allowed two of twelve proposed intervenors to enter the action, but deferred judgment on the request for a determination that this was a class action. A Three Judge Court was convened.

On September 17, 1973, the Three Judge Court rendered a Memorandum of Decision designating this as a class action, and holding that the defendant's procedures failed to meet minimal due process standards and therefor must be enjoined. Said judgment was filed at 11:54 A.M. on September 17, 1973. On October 9, 1973, a Notice of Appeal was filed in the District Court for Connecticut by the defendant.

This appeal is taken pursuant to 28 U.S.C. § 1253, and is supported by the case of *Torres v. N. Y. State Department of Labor*, 33 F. Supp. 341 (S.D.N.Y. 1971).

In that case, a challenge similar to the plaintiffs' in this case was made to New York's practice of terminating unemployment compensation benefits without a prior due process hearing. In a two to one decision, a Three Judge Court rejected both the Fourteenth Amendment claim and the statutory claim. An appeal was taken to the Supreme Court, but because of the intervening decision of the Supreme Court in *Java v. California Department of Human Resources Development*, 402 U.S. 121 (1971), *Torres* was remanded for further consideration in light of *Java*. 402 U.S. 968 (1971). On remand, the Three Judge Court adhered to its former decision. 333 F. Supp. 341 (1971). A new appeal was filed,

and on February 28, 1972, the Supreme Court summarily affirmed, 405 U.S. 949; a Petition for Rehearing was denied on March 5, 1973. 93 S.CT. 1446. No opinion was rendered, although three Justices noted their dissents.

In the instant case, the situation is very similar to that in *Torres*. The defendant therefore respectfully submits that this is a proper appeal pursuant to 28 U.S.C. § 1253.

Statutes Involved

The following federal statutes are set forth in the Appendix, beginning at page 26A:

42 U.S.C. § 503 (a) (1)

The following Connecticut statutes are set forth in the Appendix, beginning at page 26A:

§ 31-235(2)
§ 31-236(1)
§ 31-238
§ 31-241
§ 31-242
§ 31-243
§ 31-274(c)

Questions Presented

1. Whether the defendant's administrative hearing, employing a "seated interview" system, meets minimal due process requirements of the Fourteenth Amendment to the Constitution?

2. Whether the Court, in determining the constitutionality of Connecticut's administrative hearing, erred in receiving and considering evidence relating to the appeal period which followed the hearing in question?

STATEMENT OF THE CASE

On June 9, 1972, Larry Steinberg and Cecil Paskewitz brought this action on behalf of themselves and all persons similarly situated seeking injunctive and declaratory relief on the grounds that certain

Connecticut statutes provide for the termination or suspension of unemployment compensation benefits in violation of the due process clause of the U. S. Constitution and the "when due" provision of the Social Security Act. On November 13, 1972, the District Court allowed two of twelve intervenors to enter the case as plaintiffs.

The class plaintiffs in this case each have been paid benefits for varying periods of time, but then had said benefits terminated after a hearing which plaintiffs claim denied them due process of law and violated the "when due" provision of the Social Security Act. A Three Judge Court for the District of Connecticut, although following the decision in *Torres v. N. Y. State Department of Labor*, 405 U.S. 949 (1972) to the effect that there was no statutory violation of the Social Security Act, distinguished the *Torres* decision on the constitutional claim, and enjoined the defendant from following the hearing procedures in question on the grounds that said procedures failed to meet minimal due process requirements of the Constitution. Pending disposition of this appeal by the Supreme Court, the Three Judge Court has stayed the operation of the injunction.

The questions presented are so substantial that they require plenary consideration, with briefs on the merits and oral argument.

Substantiality of Questions Presented.

A. The decision is of national importance.

Although this is not a case of first impression before this Court, there has been no written Memorandum of Decision by this Court on such a case. At issue primarily is whether or not the type of hearing procedures used in terminating or suspending unemployment compensation benefits meet minimal requirements of due process. The only unemployment compensation case ruled upon thus far by this Court is *Torres v. N. Y. State Department of Labor*, 405 U.S. 949 (1972) where this Court ultimately affirmed the two to one decision of a Three Judge Court for the District of New York to the effect that New York's hearing procedures did meet such requirements. No opinion was rendered, however, except that Three Justices noted their dissents. (This Court did

remand a similar unemployment compensation case, however, *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973) with direction to the lower court to determine if the matter had become moot.)

The Three Judge Court in *Torres* distinguished this Court's ruling in *Goldberg v. Kelly*, 397 U.S. 254 (1970) and held, in effect, that a "due process" hearing as required by *Goldberg* is not required in unemployment compensation cases because of the lack of the "brutal need" concept in unemployment compensation cases. The Connecticut Three Judge Court, however, has failed to follow *Torres*, at least insofar as the constitutional claim is concerned. The defendant submits that said court should have followed *Torres* on the constitutional claim just as it did on the statutory claim.

Because *Torres* was summarily affirmed by this Court without opinion, doubt exists whether *Torres* is to be as definitive in unemployment compensation cases as *Goldberg* is in welfare cases. The various states are thus left to guess whether their procedures are to be governed by the ruling in *Torres*. Until this Court clarifies its position on this point, all states will be in doubt as to the constitutionality of their hearing procedures in unemployment compensation cases.

In addition to this case, a similar appeal has been taken to this Court by the State of New Hampshire in *Pregent v. The State of New Hampshire, Department of Employment Security et al.*, F. Supp. (1973). It is imperative that this Court clarify this question.

CONCLUSION

This is a case involving substantial legal questions which require plenary consideration by this Court in order to finally determine whether administrative hearing requirements in unemployment compensation cases must be governed by the Court's ruling in *Torres v. N. Y. State Department of Labor*, Supra.

Respectfully submitted,

ROBERT K. KILLIAN
Attorney General

DONALD E. WASIK
Assistant Attorney General

Attorneys for Appellants

PROOF OF SERVICE

I, Donald E. Wasik, Assistant Attorney General of the State of Connecticut, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on November 8, 1973, pursuant to Rule 33.3(b) of the Rules of the Supreme Court of the United States, I served a copy of the foregoing Jurisdictional Statement on Raymond J. Kelly, Esquire and John M. Creane, Esquire, by depositing the same enclosed in a sealed envelope, postage prepaid, in the United States mails, addressed to them at their last known address:

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Dated this 8th day of November, 1973.

Donald E. Wasik
Assistant Attorney General
State of Connecticut

In The

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OCTOBER TERM, 1973

No.

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA, and JUAN MIRANDA,

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Appellant.

ON APPEAL FROM A SPECIAL THREE JUDGE COURT FOR THE DISTRICT OF CONNECTICUT

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LARRY STEINBERG and CECIL PASKEWITZ
and DELIA TRIANA and JUAN MIRANDA

-v-

CIVIL
NO. 15, 104

JACK A. FUSARI, Commissioner of Labor,
The Administrator, The Unemployment.
Compensation Act, State of Connecticut

Before:

SMITH, Circuit Judge, BLUMENFELD and NEWMAN,
District Judges.

MEMORANDUM OF DECISION

SMITH, *Circuit Judge:*

This suit presents the question of whether either the Fourteenth Amendment, or §303 of the Social Security Act, 42 U.S.C. §503(a) (1), requires that recipients of Connecticut unemployment compensation benefits be afforded a *Goldberg v. Kelly*[1] hearing prior to being deprived of such payments. In addition, this case requires us to interpret the precise precedential significance of a series of rather bewildering summary dispositions of factually related suits by the Supreme Court.[2] For the reasons given below, we conclude that the Connecticut system fails to meet minimal due process standards, and therefore must be enjoined.

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[1] 397 U.S. 254 (1970).

[2] *See Torres v. New York State Department of Labor*, 405 U.S. 949 (1972), *reh. denied*, ____ U.S. ____ (March 5, 1973); *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973). These cases are discussed in some detail in part IV, *infra*.

I.

While the relevant factual background is complex, it is also undisputed, and has been the subject of a rather lengthy stipulation. Unemployment insurance benefits in Connecticut are paid entirely out of a trust fund maintained by the contributions of in-state employers, including interest and penalties.[3] So long as the state program meets federal statutory requirements, its costs of administration are met by the federal government, pursuant to §302 of the Social Security Act, 42 U.S.C. §502. The Social Security Act requires, *inter alia*, that states receiving such assistance have methods of administration "reasonably calculated to insure full payment of unemployment compensation when due," 42 U.S.C. §502(a) (1).

The claimant's entry into the unemployment compensation system begins with the filing of a valid initiating claim. Conn. Gen. Stat. §31-230.[4] The state system of determining initial eligibility is not under attack here. After a determination of such eligibility is made, the claimant is instructed to report bi-weekly to his local unemployment compensation office. Upon reporting, he fills out a "Continued Claim for Unemployment Compensation," (U.C.-46), upon which he swears to his availability for work and his "reasonable efforts" to find work, among other things. The claimant also fills out a "Continued Claim Work Effort Information Form," (U.C.-45) when making his bi-weekly visit. He then enters the claims line and eventually presents the completed forms to an employee of the Unemployment Compensation Department.[5] If no questions arise, the claimant is routinely given his benefit checks for the two-week period at issue.

If the claims line employee raises an issue of possible disqualification, he sends the claimant to another line for a "seated interview." Upon reaching the head of this line, the claimant is interviewed by a "Fact Finding Examiner," who seeks to ascertain facts as to possible disqualification. If the examiner decides that the claimant is in fact qualified to receive benefits for the period in issue, he simply sends him back to the claims line, and checks are issued. If, however, the examiner decides that the claimant does not meet the statutory criteria for receiving assistance, the claimant is not given his checks, and is told that he will receive written notification of the Department's decision concerning his eligibility for the weeks in question. A letter is then sent out under the signature of the office manager, stating the reasons for non-payment and citing a statutory provision therefor.

Of necessity, questions will often arise during the "seated interview" which involve third-party information. If such a question arises, the fact finder will attempt to contact the third party while the claimant is present, and will take the information into consideration when reaching a decision. However, if the third party cannot be reached, the claims examiner may still proceed to make his own determination as to eligibility.[6]

The most common reason for the denial of benefits to a claimant is for failure to comply with Conn. Gen. Stat. §31-235(a), which requires that applicant make "reasonable efforts to obtain work" and be "able" and "available" to do the same.[7] Other common reasons for disqualification include refusal of a suitable job offer, *see* Conn. Gen. Stat. §31-236(1), and the fact that an applicant has received some form of disqualifying income, *see* §§31-236(4) and (7).

The eligibility determination is made on a week-to-week basis, even though the claimant visits the office only bi-weekly. Thus, it

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[3]Conn. Gen. Stat. §§31-261 through 31-271 deals with the creation and administration of that fund, including collection of employers' contributions.

[4]The standards for eligibility are set out in Conn. Gen. Stat. §31-235; various reasons for disqualification appear in §31-236.

[5]The state Labor Department contains an Employment Security Division, Conn. Gen. Stat. §31-237(a), subject to the supervision of the labor commissioner as administrator, *see* §31-222(a). Within the division, there are two departments, the state Employment Service Department and the Unemployment Compensation Department. §31-237(a). It is with the latter that the claimant chiefly deals.

[6]Subject to the statutory directive that coverage, eligibility and non-disqualification are to be presumed in doubtful cases. Conn. Gen. Stat. §31-274(c).

[7]The parties originally stipulated that these reasons accounted for between 60 and 70 per cent of all denials of benefits resulting from "seated interviews." At the hearing before this court, the defendant stated that this figure was in error, being based in part upon original denials of initiating claims. Defendant was unable, however, to provide us with a more accurate figure.

is possible that the fact finder will conclude that a claimant failed to make reasonable efforts to find work in one of the weeks at issue, yet allow benefits for the other. Similarly, it is the Department's policy that a claimant remains eligible for subsequent time periods so long as he satisfies the eligibility requirements for those periods, without regard to his past record.[8]

The Department deviates from its "seated interview" procedure in at least two instances. If an employee of the State Employment Service Department[9] has provided information that a claimant has refused to accept a job referral, notice is sent to the claimant scheduling a hearing for a date and time certain and advising claimant of the reason for the hearing and of his right to bring counsel and witnesses.[10] The claimant then has the right to confront the employee at this hearing. In the routine case, benefits continue until the hearing is held.[11] Similarly, if information concerning the refusal of a suitable job comes from an interested employer — one whose "merit rating" account has been charged because of the termination of the claimant's employment[12] — notice of a proposed hearing is sent both to the claimant and the employer, and a procedure similar to the one above is followed.

However, since the majority of cases involve a fact finder's determination that the claimant has not made reasonable efforts

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[8]In practice, some of those who have been found ineligible for one claims period and have filed appeals have had later claims denied on the ground that "they have appeals pending." This is contrary to Department policy.

[9]*See* note 5 *supra*.

[10]If the claimant is scheduled to appear for a regular bi-weekly visit within two days, the notice is given to him personally then. The claimant can ask for an immediate hearing on that date, or can wait approximately five days for a hearing. If he opts for the latter course, he is routinely given his benefit checks. *But see* note 11, *infra*.

[11]Benefit checks may be withheld if the claimant provides the examiner with other disqualifying information, unrelated to the hearing subject matter, during his regular bi-weekly visit. For example, if a claimant awaiting a hearing discloses that he has been in the hospital for the past two weeks, the check may be withheld even though he is awaiting a hearing concerning his refusal of an allegedly suitable job referral.

[12]Employers' contributions to the unemployment compensation fund are determined through the operation of a complicated "merit rating" index system. Conn Gen. Stat. §31-226. *Inter alia*, the system operates to charge the employer's account for those claimants whose employment was terminated by him, and credits the employer for prompt rehiring of separated employees.

to find work, a pre-termination hearing is the exception, rather than the rule. Once the claimant receives written notice of the fact finder's decision, he may file an appeal. This appeal is heard by an Unemployment Compensation Commissioner, *see* Conn. Gen. Stat. §§31-241 and 31-242 who determines the matter of eligibility *de novo*. Unless "good cause" is "shown," Conn. Gen. Stat. §31-241, benefits for the period at issue are not paid pending appeal. No attack is made in this suit upon the procedures employed in the eventual Commissioner's hearing, which are statutorily mandated "as far as possible," to be "in accordance with the rules of equity." Conn. Gen. Stat. §§31-244 - 31-248.[13]

II.

A review of the factual situations of three of the named plaintiffs will serve to put the general background outlined above into sharper perspective.[15] Larry Steinberg had filed a valid initiating claim for

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[13]The state Unemployment Compensation Commission is a statutorily created body, comprised of six members, five from specified districts and one from the state at large. Conn. Gen. Stat. §31-238. It is a seperate entity from the unemployment compensation department of the labor department.

[14]Appeal may be taken from the Commissioner's decision to the Superior Court, and ultimately to the state Supreme Court. Conn. Gen. Stat. §31-249.

[15]The original complaint named as plaintiffs Larry Steinberg and Cecil Paskewitz, and requested a determination that the suit proceed as a class action. In a memorandum of decision dated November 13, 1972, Judge Newman granted the plaintiffs' motion to convene this statutory three-judge court; at the same time, he deferred consideration of the class action issue for this tribunal. For the reasons set out in part III, *infra*, we today hold that this suit may proceed as a class action.

At the time that the original motion to convene this court was under consideration, twelve additional plaintiffs sought to intervene. In the November 13 memorandum, Judge Newman denied ten of these requests. He granted the motions of Delia Triana and Juan Miranda to intervene, noting that these two were presently back on the unemployment compensation rolls after the disposition of their appeals, and thus had a particular interest in the procedures that might be employed in any subsequent terminations of their benefits.

The situation of Cecil Paskewitz has been the subject of a recent change of position of the defendant Administrator. Paskewitz had received weekly benefits from August, 1971, until February of 1972, covering a period of some 26 weeks. In February of 1972, Paskewitz applied for extended benefits under Conn. Gen. Stat. §31-232b *et seq*. The application was initially approved, but when Paskewitz went, on March 2, 1972, to the Enfield office to collect his extended benefit checks, he was told that he was no longer eligible and would not receive further assistance. His appeal of that decision has been heard by an Unemployment Commissioner; at the time this case was argued, no decision had been forthcoming.

The defendant Administrator now concedes that Paskewitz should have been given

benefits in Willimantic on or about April 17, 1971, and received weekly benefits through October 9 of that year. On October 27, Steinberg reported to the Willimantic Unemployment Compensation Office for his bi-weekly visit, and to claim benefits for the weeks ending October 16 and 23, 1971. He was directed from the claims line to a "seated interview." After some discussion with a fact finder, Steinberg was told that he would not receive the two weekly checks at issue, for failure to use "sufficient efforts to obtain work."

A formal notice, citing the statutory requirements of Conn. Gen. Stat. §31-235(2) was received by Steinberg on November 1, 1971, disqualifying him from benefits retroactive to October 10. Steinberg filed an appeal to the Unemployment Compensation Commission on November 5; a hearing was held on January 13, 1972. On May 10, 1972, the Commissioner upheld the Departmental fact finder; Steinberg did not seek review in the courts.

Delia Triana had received benefits in Bridgeport from June 18 through July 8, 1972. On about July 24, 1972, she visited the Bridgeport office to file for benefit checks covering the weeks ending July 15 and 22, 1972. She was directed to a "seated interview," where it was determined that she had not made sufficient efforts to find work for the two periods, and she did not receive her checks. At two subsequent bi-weekly appointments, Mrs. Triana was disqualified from receiving benefits for the period between July 29, 1972, and August 18, 1972, on similar grounds.

Mrs. Triana filed her original appeal on August 7, 1972; her case was heard on October 27. On November 10, 1972, the Commissioner upheld the denial of benefits for the first two-week period, but held that Mrs. Triana was entitled to benefits for the latter period. His decision was not appealed by either side.

Juan Miranda presents a similar situation. After the familiar

a hearing on the underlying issue, which involved a determination of whether he had compiled sufficient wage credits to have been initially eligible for benefits. The defendant has changed its policy so that future cases involving such entitlement determinations will be handled in the following manner. Claimants are to be notified of a hearing at a time and place certain, at which they may bring counsel and present evidence on the entitlement issue. Benefits will be paid to affected claimants until a written decision on the merits has been issued, following the noticed hearing.

"seated interview," he was denied benefits for the weeks ending August 19 and 26, 1972, on the grounds of having made insufficient efforts to find work. He was notified on September 11, 1972, that all claims from August 13, 1972, onward were disapproved on the above grounds. He filed a prompt notice of appeal; hearing was held on October 17, 1972. On October 24, 1972, the Commissioner held that the benefits from August 13 to the date of the appeal hearing were wrongly withheld. The Department did not appeal, and Miranda eventually received checks covering this time period.

III.

We turn first to plaintiffs' request to have this suit designated as a class action. The relevant class is claimed to be all present and future recipients of unemployment compensation benefits whose benefits are subject to termination without a prior hearing, with the exception of those persons whose benefits are terminated simply because of exhaustion of entitlement under Conn. Gen. Stat. §31-236. The class is so numerous that joinder is impracticable, and there are clearly common questions of law and fact. In addition, we find that the claims of plaintiffs Steinberg, Triana and Miranda[16] are typical of the claims of the class, and that these three representative plaintiffs will fairly and adequately protect the class interests. Since the defendant Administrator has rather clearly acted on grounds generally applicable to this class in allowing benefits to be terminated after a "seated interview," Rule 23(b) (2)'s requirements are met, and we designate this a class action. *See Wheeler v. State of Vermont*, 335 F. Supp. 856, 862 (D. Vt. 1971) (3-Judge court); *Crow v. California Department of Human Resources*, 325 F. Supp. 1314, 1316 (N.D. Cal. 1970); *Torres v. New York State Department of Labor*, 318 F. Supp. 1313, 1317-18 (S.D.N.Y. 1970).

We deal next with the defendant Administrator's claim that since the three class representatives have each now had a hearing before an Unemployment Commissioner, this case is moot. We cannot agree.

[16]Given the defendant Administrator's changed position with respect to Cecil Paskewitz and those similarly situated, *see* note 15, *supra*, we do not name Paskewitz as a class representative.

This suit was filed as a class action, and, although the formal determination of class status was made only today, the case has presumptively been a class suit since its inception. *See* 3B J. Moore, Federal Practice, ¶23.50 at 23-1103 & n. 12; *Torres, supra*, 318 F. Supp. at 1317. Thus, the fact that the named representatives have received their Commissioner's hearings does not end the matter; there are numerous class members who have either had their benefits terminated and have not yet received hearings, or who are subject to like treatment in the future. As to them, the matter is far from moot, and it would serve little but form for us to require these class members to intervene here — as some of them have sought[17] — simply to keep the name of someone who has not yet received a hearing in the case caption. The fact that the named plaintiffs have finally received hearings does not moot this action. *See* 3B J. Moore, *supra*, ¶23.40 at 23-651, 23-652 and cases cited therein.

There are other compelling reasons for not finding this case to be moot. The defendant Administrator has not taken the position that termination of benefits without hearing will not recur; indeed, he vigorously argues the merits of the present "seated interview" system. Thus, we can hardly conclude that "there is no reasonable expectation that the wrong [if in fact a wrong there be] will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Given the delays inherent in the litigation process, to find this case moot would amount to a directive to the defendant that the challenged conduct may be continued regardless of its legality, since it is quite unlikely that any plaintiff can successfully pursue a suit to completion before his Commissioner's hearing is scheduled. Since the class has a continuing controversy with the Administrator, this suit is not moot. *See Mindo v. New Jersey Department of Labor & Industry*, 443 F. 2d 824 (3rd Cir. 1971); *Wheeler, supra*, 335 F. Supp. at 860; *Crow, supra*, 325 F. Supp. at 1316; *Torres, supra*, 318 F. Supp. at 1316-17.[18]

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[17] *See* note 15, *supra*.

[18] The same conclusion would seem to have been reached, *sub silentio*, in *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971).

Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973), upon which the defendant relies, does not compel a different result. In *Burney*, a three-judge Indiana district court had held, in factual circumstances analogous to those presented here, that Indiana's system of terminating unemployment benefits without a prior hearing was in conflict with the "payment when due" provisions of the Social Security Act, 42 U.S.C. §503(a)(1). The Supreme Court noted probable jurisdiction, 406 U.S. 956 (1972), but on January 17, 1973, in a brief *per curiam* opinion, remanded the case to the district court "to consider whether it has become moot." The Court noted that Mrs. Burney, who was the only named class representative, had succeeded, at a point in time after the entry of the district court summary judgment, in having her determination of ineligibility reversed. She had consequently been awarded fully retroactive benefits. In view of "the question whether there continues to be a case or controversy in this lawsuit," the Supreme Court remanded to the district court for further findings.

At the outset, it is useful to note exactly what the Supreme Court did and did not do in *Burney*. It did not find the case to be moot, but only raised the issue and asked the district court to consider it. Thus, narrowly read, *Burney* only stands for the proposition that when the only class representative succeeds in gaining full retroactive benefits while the case is pending before the Supreme Court, the district court should consider the issue of mootness. Even if the case at hand were at all factually similar to the *Burney* situation, this court has done precisely that, and has concluded that the case is not moot.

And, as must seem evident from the above summary of the facts in *Burney*, there are a number of pertinent points of distinction between that case and this one. While Mrs. Burney

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In that case, two California unemployment compensation recipients had challenged that state's practice of suspending benefit payments when an employer took an appeal from an initial eligibility determination. They filed a class-action complaint in federal district court; they then had hearings before an Appeals Board Referee. The three-judge district court enjoined the California procedure on both constitutional and statutory grounds, 317 F. Supp. 875 (N.D. Cal. 1970), never discussing the mootness issue. The Supreme Court affirmed on the statutory ground alone, and never once intimated that the case might be moot.

was the sole class representative there, here there are three — Steinberg, Triana and Miranda. Of these three, only Miranda is in a situation similar to that of Mrs. Burney, having received retroactive benefits after winning his appeal. Steinberg never "succeeded in obtaining a reversal of the initial determination of ineligibility," 409 U.S. at 541, made at the "seated interview"; Mrs. Triana succeeded only in part.

Moreover, we note that the "new facts" that prompted the *Burney* remand — Mrs. Burney's winning of her appeal — took place after the district court decision was rendered. The Supreme Court may well have simply wanted the district court to evaluate this new development, particularly in light of the possibility that the sole named class representative might not now be interested in further vigorously pursuing the suit. Here, all the operative facts have taken place *before* today, and have been given our full consideration. We have had an opportunity to witness the able prosecution of this suit by the class representatives even after they had received Commissioner's hearings. We are confident that such exemplary representation will continue, should further proceedings be necessary. Thus, whatever apprehensions may have caused the *Burney* remand for consideration of the mootness issue, this court has had the opportunity to evaluate defendant's mootness arguments at the present time, and finds them without merit.

IV.

As noted at the outset, plaintiffs challenge the "seated interview" system on two grounds: (1) that it fails to provide minimal Fourteenth Amendment due process; and (2) that it conflicts with the "payment when due" directive of §303(a)(1) of the Social Security Act, 42 U.S.C. §503(a)(1). Since any discussion of these issues is dominated by the manner in which the Supreme Court has recently treated a series of similar cases, it is to that background that we now turn.

The starting point is the decision of a three-judge court in *Torres v. New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971), in which the New York practice of terminating unemployment benefits without a prior hearing was challenged.

In a 2-1 decision, the court rejected the plaintiffs' Fourteenth Amendment claims, distinguishing *Goldberg v. Kelly* on the ground that it was a welfare case, hence involving "brutal need" and a special necessity for pre-termination hearings. The court unanimously rejected the plaintiffs' statutory claim, reasoning that when a departmental employee had determined that a claimant is disqualified because of his inadequate efforts at finding work, it could not be said that payments are "due." The Torres court explicitly rejected the authority of *Java v. California Department of Human Resources Development*, 317 F. Supp. 875 (N.D. Cal. 1970), in which California unemployment compensation procedures were held in conflict with both the Fourteenth Amendment and the Social Security Act.[19] 321 F. Supp. at 438 n. 1.

An appeal followed, but before it was decided, the Supreme Court affirmed the judgment of the district court in *Java*, 402 U.S. 121 (1971). The Court held that the California scheme was in conflict with the "payment when due" provisions of §303(a)(1), and thus did not reach the constitutional issue. Consequently, the Court remanded *Torres* to the three-judge court for further consideration in light of *Java*. 402 U.S. 968 (1971).

On remand, the *Torres* three-judge court unanimously adhered to its former decision on the statutory point. 333 F. Supp. 341 (S.D.N.Y. 1971). The *per curiam* opinion noted that the California system attacked in *Java* involved automatic termination of unemployment benefits whenever an employer filed an appeal from an eligibility determination. The practice under challenge in New York, however, involved suspension of payments after an administrative determination of disqualification, which followed an interview with the claimant. The court reasoned that payments could not be said to be "due" in New York after an administrative official had made a determination that they were not. This was contrasted with the California system, where payments were automatically suspended upon an employer's appeal, even though an administrative official had in fact determined that the claimant

[19] *See* note 18, *supra*.

was eligible, or put another way, that payments were "due." The *Torres* court adhered to its original decision on the constitutional issue, again splitting 2-1. *Id.* at 343.

A new appeal was filed. On February 28, 1972, the Supreme Court summarily affirmed, 405 U.S. 949. No opinion was filed. Justices Douglas, Brennan and Marshall noted their dissents, simply stating that *Goldberg v. Kelly* required reversal.

This, however, was not the final chapter. In the period before the *Torres* affirmance, an Indiana three-judge court, facing issues seemingly identical to those in *Torres*, found Indiana procedures in conflict with §303(a)(1) of the Act. *Hiatt v. Indiana Employment Security Division*, Civ. No. 70 F 122 (N.D. Ind. Oct. 27, 1971). One of the *Hiatt* plaintiffs was in a factual situation identical to that in *Java*, and the state did not appeal as to him. The other plaintiff, however, had her benefits suspended not because of an employer's appeal, but for insufficient efforts to find work. The state appealed as to her. Instead of simply vacating the judgment on the basis of *Torres*, the Supreme Court noted probable jurisdiction *sub nom. Indiana Employment Security Division v. Burney*, 406 U.S. 956 (1972).

The *Torres* plaintiffs noted this apparent anomaly. Consequently, they filed a petition for rehearing, arguing that any decision on the statutory claim in *Burney* would necessarily control their case. *Inter alia*, the *Torres* plaintiffs also argued that the Supreme Court's decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972), which came after the *Torres* affirmance, undercut the district court's reliance upon "brutal need" as a prerequisite to due process claims, and hence necessitated a new look at the Fourteenth Amendment claim.

However, as noted above, the Court did not reach the merits in *Burney*, instead remanding the case for the district court to consider the issue of mootness. 409 U.S. 540 (1973). Justices Marshall and Brennan dissented, disagreeing with the mootness suggestion and arguing that *Goldberg v. Kelly* required affirmance.

Several months later, on March 5, 1973, the rehearing petition in *Torres* was denied, again without opinion. ..... U.S.....

Justice Marshall, joined by Justices Douglas and Brennan, dissented, outlining the prior history of *Torres* and *Burney* and complaining that the Court "finally disposes of important issues of constitutional law and statutory construction in a fashion which can only be characterized as bizarre." The three dissenters again noted their position that *Goldberg v. Kelly* required a prior hearing in these circumstances and argued that it was likely that *Java* required a finding of a statutory violation.

V.

Were we writing on a somewhat cleaner slate, we would have little difficulty in rejecting the reasoning of the district court in *Torres*, and concluding, largely for the reasons so ably set out by Judge Oakes in *Wheeler v. State of Vermont, supra*, that the Connecticut unemployment compensation procedures here challenge conflict with both the Fourteenth Amendment and the Social Security Act. *See also Crow, supra; Hiatt, supra; Java, supra.* But, such a course is not open to us. It is the law of this circuit that a summary affirmance by the Supreme Court is entitled to full precedential weight, *Doe v. Hodgson*, ____ F. 2d ____, slip op. 3201, 3205 (2d Cir. May 1, 1973), despite a number of suggestions elsewhere to the contrary. *See, e.g., Dillenburg v. Kramer*, 469 F. 2d 1222, 1225 (9th Cir. 1972); *Serrano v. Priest*, 487 P.2d 1241, 1264 & n. 35, 5 Cal. 3d 584, 96 Cal. Rptr. 601 (1971). *Cf.* Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. Chi. L.Rev. 1, 74 n. 365 (1974).[20] As a district court sitting in the Second Circuit, we are bound by this rule. *See Lewis v. Rockefeller*, 431 F.2d 368, 371 (2d Cir. 1970).

Thus, the threshold question before us is whether the summary affirmance in *Torres* forecloses inquiry into the merits here. The state so argues, and draws at least inferential support from Mr.

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[20] If nothing else, the procedural history outlined in part IV, supra, provides much ammunition to those who would abolish both the three-judge court requirement and direct appeal to the Supreme Court in constitutional cases. *See generally* Report of the Study Group on the Caseload of the Supreme Court 25-34 (1972). *Cf. Roe v. Ingraham*, ____ F. 2d ____, slip op. 3761, 3768 n. 4 (2d Cir. May 24, 1973) and sources cited therein.

Justice Marshall's lament that denial of rehearing in *Torres* "finally disposes" of the relevant questions. But, there are at least several reasons for supposing that the important issues here cannot be disposed of simply through a citation to *Torres*. For one thing, there is the Supreme Court's noting of probable jurisdiction in *Burney*. That case involved issues seemingly identical to those in *Torres*. Since the noting of probable jurisdiction represents at least a preliminary conclusion by the Court that substantial issues are posed by an appeal, *cf. Sugarman v. United States*, 249 U.S. 182, 184 (1919); *Brolan v. United States*, 236 U.S. 216, 218 (1915); R. Stern & E. Gressman, *Supreme Court Practice* 230-38, 356-60 (4th ed. 1969); this action in *Burney* must stand for the proposition that *Torres* does not absolutely foreclose inquiry into the area.

Moreover, a summary affirmance which, like that in *Torres*, recites no reasons or factual background, provides at least some difficulties in precedential interpretation. The affirmance is entitled to precendential weight, to be sure, but divining the precise content of the precedent remains difficult. In *Doe v. Hodgson, supra*, the Second Circuit resolved that dilemma by looking to the holdings in the district court below, and implicitly assuming acceptance of them by the Supreme Court. It would seem that the same course is mandated here, where the plaintiffs make serious claims that the case at hand is distinguishable, both factually and legally, from *Torres*.

Put another way, we view the summary affirmance in *Torres* as standing for the proposition that the Supreme Court at that time thought that the district court's application of the law to the particular facts presented was correct. Plaintiffs claim that the law has so evolved since *Torres*, and that the facts here are so different, that either of the two elements independently would justify a different result here. To evaluate that argument, we must necessarily focus on what the *Torres* court said, and how this case is alleged to differ.

A.

Judge Hays' opinion for the three-judge court in *Torres* treated the constitutional issue in the following manner. The opinion began

by noting that plaintiffs placed primary reliance on *Goldberg v. Kelly*. However, Judge Hays maintained, there was a crucial difference between *Goldberg* and the case at hand: *Goldberg* dealt with the issue of pre-termination hearings for welfare recipients. The three-judge court then quoted those portions of the *Goldberg* opinion which stressed this factor, and noted the "unique situation" and "brutal need" of those whose only source of sustenance is withdrawn. *See* 321 F. Supp. at 436 (quoting from 397 U.S. at 261).

Judge Hays then noted that while need is a criterion for eligibility for the kind of welfare payments involved in *Goldberg*, unemployment compensation carries with it no needs test. *Id.* at 437. *See* S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935). Moreover, the claimant denied unemployment benefits in New York could qualify for welfare, if the requisite need were shown.

> "Thus the worst possible effect of the procedure which plaintiffs attack as being lacking in due process would be that for a period of a few weeks until a hearing is held a claimant who is finally determined to be eligible for payments would have to live on his accumulated savings or, if he had no savings, would have to resort to relief."
> 321 F. Supp. at 437.

The opinion then went on to maintain, quoting from *Escalera v. New York City Housing Authority*, 425 F. 2d 853, 867 (2d Cir.) *cert. denied*, 400 U.S. 853 (1970), that

> "The minimum procedural requirements of due process under the Fourteenth Amendment must reflect the balance between the government's interest in efficient administration and the nature of the individual's interest being affected by governmental action."
> 321 F. Supp. at 437.

The governmental interests involved in *Torres* were seen to be those involved in making accurate eligibility determinations without undue pressures of speed, and the difficulties in recouping amounts erroneously paid out. The district court majority saw these interests as outweighing the interests of the individuals involved, since it

defined the latter as the possibility that a claimant might have to live off his savings or welfare for the "few weeks" between termination and a full hearing. These individual stakes were viewed as much less momentous than those presented by the "brutal need" situation in *Goldberg*.

Plaintiffs have directed two lines of attack at the *Torres* opinion, and derivatively, at the summary affirmance. Their first point is that Supreme Court decisions since the *Torres* affirmance have discredited the district court's due process analysis, and thus the summary affirmance is no longer good law. This argument finds some succor in *Fuentes v. Shevin*, 407 U.S. 67 (1972). There, in striking down prejudgment replevin laws as violative of due process, the Court labeled as "narrow" any reading of *Goldberg* that stressed the "necessary" nature of welfare benefits. *Id.* at 88-90. While such factors might be relevant to the *form* of due process hearing, *id.* at 89 n. 20, the Court emphasized that the Fourteenth Amendment required some sort of notice and hearing before deprivation of all but *de minimis* property interests. *Id.* at 90 & n. 21.

Plaintiffs seize upon this language and that in more recent Supreme Court decisions, *e.g.*, *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972), and contend that the *Torres* due process rationale is no longer viable, if indeed it ever was. Consequently, they ask us to hold that we are not at all bound by the *Torres* due process holding.

While it does seem clear to us that cases subsequent to the *Torres* affirmance have made it clear that *Goldberg's* scope is not confined to deprivations of "necessary property" which result in "brutal need," we do not view this "change of law" as sufficient reason, in and of itself, to ignore the *Torres* holding. This decision is mandated by the Second Circuit's opinion in *Doe v. Hodgson, supra*. There, the panel noted that under recent trends in equal protection law, the Supreme Court's decision in *Romero v. Hodgson*, 403 U.S. 901 (1971), was open to serious attack. Nonetheless, the appellants were told that any further pronouncements on the

subject would have to come from the Supreme Court. _____F. 2d _____; slip op. at 3206-7. Thus, even assuming *arguendo* that recent due process developments undercut the *Torres* rationale, the Second Circuit's decision forecloses us from avoiding *Torres* on that ground alone.

Nonetheless, we are persuaded by plaintiffs' second argument that the *Torres* affirmance does not foreclose the claims made here. As noted above, in deciding exactly what sort of procedures were mandated by the due process clause in the *Torres* situation, Judge Hays found that the claimant's interests were measured by the possibility that he might have to live off his savings or welfare in the "few weeks" between termination and a full hearing. Those interests were found not to outweigh the governmental interest in accurate and unhurried determinations of eligibility, and the difficulties inherent in recouping mistaken payments. Plaintiffs here argue that, even assuming *arguendo* the correctness of the *Torres* balancing, the factual situation of the Connecticut claimant is sufficiently different from that of the New Yorker to require a different result.

In *Torres*, the record indicated that the average disputed compensation case took 45 days determination. 321 F. Supp. at 439 (Lasker, *J.*, dissenting). This period, then, is the "few weeks" during which the terminated New York claimant might have to rely upon savings or welfare, while awaiting his hearing on the merits of the termination issue. Even if the "briefness" of this period cut against the *Torres* plaintiffs' due process point,[21] it is abundantly clear that the relevant delays in Connecticut are far longer. The record indicates that of the 461 intrastate appeals disposed of in Connecticut during December of 1972, fully 414 took at least 101 days between the time an appeal was filed and the date a final decision was reached. Put in percentage terms, this means that about 89.8% of all appeals took over 100 days to decide. And, the figures indicate that 61.4% of all appeals take over 125 days to dispose of, while 29.5% consumed over 150 days before the Com-

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[21] *Compare Wheeler, supra*, 335 F. Supp. at 861, where Judge Oakes viewed a five-week delay as "unreasonable."

missioner's decision.[22] Figures from other months strongly suggest that the December figures are not unrepresentative.[23]

It may be one thing to find the claimant's due process claims insufficient in New York, where 45 days are consumed awaiting a decision in the average appeal, but it is quite another to do so in Connecticut, where the average delay is well over 126 days, or 18 weeks. And, while New York had Aid for Dependent Children programs available for those struck by "brutal need" during the 45-day period, Connecticut, with its substantially longer delays, does not participate in the Aid for Dependent Children-Unemployed

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[22]The above figures derive from an exhibit prepared by plaintiffs after detailed examination of Unemployment Compensation Commission records. Their accuracy is not challenged by the defendant Administrator. The figures cover the 461 intrastate appeals disposed of by written decision in December, 1972; interstate appeals, which involve obtaining work and wage records from the state of the claimant's prior residence, were not included, as they generally involve even longer delays.

The aggregate figures are as follows:

Days Between Filing of Appeal and Commissioner's Decision	Number of Appeals In Category	Percentage of Total
0-30	1	.2%
31-45	2	.4%
46-75	9	2.0%
76-100	35	7.6%
101-125	131	28.4%
126-150	147	31.9%
Over 151	136	29.5%
	461	

[23]The state Labor Department must submit a "Form ES-221" entitled "Benefit Appeals" to the United States Department of Labor on a monthly basis. That form provides information about the time lapse between the date of filing an appeal and the date of mailing the Commissioner's decision. The time lapses are broken into four categories: 0-30 days, 31-45 days, 46-75 days, and over 75 days. (Compare the more detailed breakdown for December, 1972, in note 22, *supra*). The following table represents the figures presented for intrastate appeals in the three most recent months, for which data was submitted.

Number of Days	March, 1973	February, 1973	January, 1973
0-30	3	0	0
31-45	4	1	0
46-75	2	6	3
Over 75	676	521	503
Total	685	528	506

Parents program.[24] If the appropriate weighing of governmental interests against those of the individual is really a case by case process, *see Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961), it seems patent that the results of the weighing process employed in *Torres* are inapplicable here. We thus hold that the *Torres* affirmance does not foreclose our independent appraisal of the merits of plaintiffs' constitutional claim.

On the merits of that due process claim, recent Supreme Court decisions seem to mandate a two-part inquiry. The first question is whether plaintiffs here have a sufficient "property" interest in receipt of unemployment compensation to trigger Fourteenth Amendment due process requirements. *See generally Board of Regents v. Roth, supra*, 408 U.S. at 576-579; *Perry v. Sinderman, supra*, 408 U.S. at 599-603. It seems clear to us that such a "property" interest is present here. The Supreme Court has "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," *Roth, supra*, at 571-72. The Court recently characterized *Goldberg v. Kelly* as standing for the proposition that

> "[A] person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process."
> *Roth, supra* at 576.

That being the case, it follows *a fortiori* that one who has been receiving unemployment benefits under identical conditions has a similar "property" interest. *See also Fuentes, supra*, 407 U.S. at 88-90. It makes little difference to contend, as the defendant does here, that those who fail the "seated interview" test are not entitled to benefits, and hence do not have "property" interests. As in *Goldberg*, that entitlement is precisely what is at issue, and the "property" interest cannot be terminated or suspended without Fourteenth Amendment due process.

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[24]Connecticut does, however, have a system of "town" assistance. Conn. Gen. Stat. §17-272 *et seq.*

The second part of the inquiry is what form of procedural due process is necessary to protect the particular "property" interest involved. *Fuentes, supra,* 407 U.S. at 90 n. 21; *Goldberg, supra.* The defendant Administrator argues that the "seated interview" satisfies minimal due process standards. He contends that the large bulk of disqualifying information is provided by the claimants themselves; he distinguishes *Goldberg v. Kelly* on the ground that the claimant here at least has an opportunity to argue his case to the fact finding examiner. Finally, it is claimed that, in the absence of *Goldberg* "brutal need," the informal system here conforms with Fourteenth Amendment requirements.

Even accepting *arguendo* defendant's arguments about the absence of "need" among unemployment compensation claimants, and noting the ability of plaintiffs here to at least confront the decision maker, we still think it clear that the "seated interview" system does not provide sufficient procedural due process. Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact finding examiner may go beyond the record of the "seated interview" in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification. *Compare Goldberg v. Kelly, supra,* 397 U.S. at 266-71.[25]

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[25]To be sure, the claimant has somewhat constructive notice that, on bi-weekly occasions, he may be asked to undergo a "seated interview" and satisfy the examiner as to his efforts and availability for work. But, even leaving aside the problem that notice alone cannot replace the meaningful opportunity to present evidence, *cf. Wheeler v. Montgomery,* 397 U.S. 280 (1970), several difficulties remain. The claimant surely cannot be expected to bring counsel and witnesses to every bi-weekly claims session, on the off chance that a "seated interview" will result. Nor can the claimant be certain in advance of the subject matter of the interview. While questions involving reasonable efforts at finding work are most common, "seated interviews" can and do involve numerous other grounds for possible disqualification. *Cf.* Conn. Gen. Stat. §31-236 & n. 7 *supra.*

It might also be noted that the record discloses some uncertainty about the standard against which "reasonableness" is measured. Theodore Hatcher, Unemployment Compensation Director for Connecticut, testified that there is an informal rule of thumb that the claimant must list at least three places at which he has sought employment a week on his U.C.-45. In response to a question from this court, Mr. Hatcher said that claimants were advised of this rule at their benefit rights interview. However, Eleanor H. Smarz, manager of the Bridgeport Unemployment Compensation office, responded to a question about whether claimants were told of the "rule of thumb" by stating:

> "It was not an official notification that they were to tell these people, if that is what happened. But this is, there's no official number or anything in reference to this."

Thus, serious questions arise about whether a claimant can ever meet a burden of proof based on a "rule of thumb" that he has never heard of. Indeed, even Mr. Hatcher conceded that in "crash periods" not everyone receives a benefit rights interview, at which the information is supposedly imparted.

To be sure, due process requires something less in this context than a full-blown trial. Indeed, it might even be that differences in "need" requirements between welfare and unemployment benefits could justify somewhat less comprehensive procedures here than were required in *Goldberg.*[26] But, whatever the minimal requirements of Fourteenth Amendment due process in this context, the "seated interview" system does not provide them. At the very least, claimants are entitled to some advance notice of the hearing and precise issues to be considered, with the concomitant opportunity to present evidence and bring counsel.[27] Of course, formulation

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[26]Of course, even if "need" is not a prerequisite to eligibility for unemployment benefits, it does not necessarily follow that the average claimant is not in need. *See generally Java, supra,* 402 U.S. at 130:

> "A kind of 'need' is present in the statutory scheme for insurance, however, to the extent that any 'salary replacement' insurance fulfills a need caused by lost employment."

And *id.* at 131-32:

> "Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." (footnote omitted)

Recent statistics suggest that the average unemployment compensation recipient is hardly well-off. In 1970, the average wage covered by unemployment insurance in the United States was $141.09; in Connecticut, it was $149.76. The average weekly benefit in that year in the United States was $50.31, or 35.7% of the average covered wage; in Connecticut, it was $60.26, or 40.2% of the wage. United States Department of Labor, Handbook of Unemployment Insurance Financial Data 1938-1970 at 139 (1971). Other studies suggest that the average claimant is often in dire straits. *See generally* Motion for Permission to File Brief Amici Curiae and Brief Amici Curiae of National Employment Law Project, et al., in *Indiana Employment Security Division v. Burney,* and sources cited therein.

[27]Of course, the defendant may simply choose not to have a preliminary hearing at all, and allow benefits to be paid pending the full hearing before the Commissioner.

of an appropriate system is in the first instance a responsibility of the defendant Administrator. But when an administrator is making as subjective a determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to fairly and completely present his side of the case, and to meet any unfavorable evidence. This the present system does not do.

B.

With regard to the statutory question, plaintiffs have made a number of arguments designed to distinguish *Torres* and avoid the force of the Supreme Court's summary affirmance. First, they point to the differences, outlined above, between the time periods a claimant encounters in New York and Connecticut while waiting for his appeal to be decided. Secondly, they present statistics showing that a significant number of claimant appeals result in reversals of the original disqualification decision, a factor apparently not taken into account by the *Torres* court.[28] *Compare Crow*, *supra*, 325 F. Supp. at 1318 & no. 2 (noting that 32% of those eventually receiving full hearings are found eligible).

Taking these facts together, plaintiffs argue that even if the New York system could be seen as providing payments "when due," the Connecticut procedure, with its lengthier delays and large reversal rate, presents a different problem. In the abstract, the argument has much force. If the purpose of unemployment compensation really is "salary replacement" and providing benefits to the worker as close to the date of unemployment as possible, *see Java*,

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See Goldberg v. Kelly, 397 U.S. at 267 n. 14. That choice, however, is up to the state, particularly in light of possible difficulties in recouping benefits erroneously paid during the period before a hearing is held.

[28]The statistics are derived from the "Form ES-221," *see* note 23, *supra*. One portion of that form breaks down the monthly total of appeals decisions into those appeals taken by claimants, and those decided in favor of claimants. For the period of July, 1971, to June, 1972, there were 6534 claimant appeals, and 1706 of these were resolved in favor of claimants, for a reversal figure of about 26.1%. In the period from July, 1972, to October, 1972, there were 769 reversals out of 2959 claimant appeals, or about 26.0%. In the three-month period from January, 1973, through March, 1973, there were 1759 claimant appeals, and 342 reversals, or a rate of about 19.4%.

supra, 402 U.S. at 129-133, it would seem that a system that makes large numbers of those with valid claims wait on the average of over 100 days before allowing them benefits conflicts seriously with the statutory objectives.

But for us to accept the statutory challenge being made here would be to disregard what occurred in *Torres*. As will be remembered, the original judgment of the *Torres* court was vacated and remanded for consideration in light of *Java*. 402 U.S. 968 (1971). With its attention thus focused on the statutory issue, the *Torres* court nonetheless adhered to its original decision. 333 F. Supp. 341 (S.D.N.Y. 1971). It distinguished *Java* because that case had involved the automatic suspension of benefits upon the taking of an appeal by the employer. The court then met the "when due" problem with a holding that had nothing to do with either average delay periods or reversal rates. Quite simply, the *per curiam* opinion stated that, because of the administrative determination made at the interview of the claimant, it simply could not be said that payments were "due." The Court stressed the fact that the administrative determination was made on the basis of facts not previously available. It was this opinion that the Supreme Court summarily affirmed.

The summary affirmance would thus seem to stand for the proposition that payments are not "due" until a hearing is held and someone says they are. In that case, the factual distinctions offered by plaintiffs here are of no avail, and we would seem to be bound by the *Torres* affirmance to reject the statutory argument.

To be sure, the Supreme Court did note probable jurisdiction in *Burney*, a case decided solely upon statutory grounds below. But we are still left with three key facts: (1) the Supreme Court remanded *Torres* for reconsideration on the statutory grounds; (2) the district court responded with a theory which, if accepted, would foreclose the claims made here, and, (3) the Supreme Court summarily affirmed. In light of that scenario, we are not free to decide the issues *de novo*. *Burney* may well evidence the Court's own willingness to clarify or distinguish *Torres*, but until such a step is forthcoming, we are bound by that case's rejection of the argu-

ments put forth here.

VI.

While we find that state's procedure for terminating unemployment compensation benefits lacking in due process in a number of respects, we note that conforming to the requirements of due process will not necessarily require the remedying of every deficiency. Essentially, we find due process lacking because (a) a property interest has been denied (b) at an inadequate hearing (c) that is not reviewable *de novo* until an unreasonable length of time. The state thus has three areas in which to make improvements. For some cases, it can provide for an expedited hearing *de novo*. For others, it can bring the initial hearing procedures up to a minimum standard of fairness. In this regard, essential fairness can be expeditiously achieved in some instances by setting forth and communicating to claimants in advance a quantifiable standard concerning reasonable effort to find employment.[29] For example, if a stated number of employers must be visited, a claimant's acknowledgment that he had seen fewer than the required number would eliminate the factual controversy and provide an adequate basis for denial of benefits. Finally, in those cases where proper hearings or reasonably prompt *de novo* review are for some reason burdensome, the state can always consider paying the benefit for the disputed week, reserving the right to set off that week's payment against a future week's benefit once the proper procedure for an adverse determination has finally been followed. Of course, the choice of methods to bring its procedures into compliance with the Due Process Clause rests with the state.

In summary, then, we find that the "seated interview" system as currently used for terminating or suspending the payment of unemployment compensation benefits does not provide minimal due process under the Fourteenth Amendment to the Constitution. We accordingly enjoin the defendant Administrator, his successor in office, agents, and employees from administering Chapter 567,

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[29]While the record discloses some evidence of a quantified standard, it is not clear that this standard is communicated to claimants, or even that all administrators are aware of it. *See* footnote 25, *supra*.

Conn. Gen. Stat. (§31-222 *et seq.*) in such a manner as to deprive members of the plaintiff class of unemployment benefits without first according them a constitutionally sufficient prior hearing.

This opinion shall serve as the court's findings of fact and conclusions of law, under Fed. R. Civ. P. 52(a).

Dated: September 17, 1973.

J. Joseph Smith
United States Circuit Judge

M. Joseph Blumenfeld
Chief United States District Judge

Jon O. Newman
United States District Judge

STATUTES INVOLVED

42 U.S.C. § 503. "State laws, provisions required; stopping payments on failure to comply with law

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for-

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . . . "

Conn. Gen. Stat. §31-235. "Benefit eligibility conditions; qualifications.

An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that . . . (2) he is physically and mentally able to work and is available for work and has been and is making reasonable efforts to obtain work, provided a woman shall not be required to be available for work between the hours of one and six o'clock in the morning; . . . . "

Conn. Gen. Stat. §31-236. "Disqualifications.

An individual shall be ineligible for benefits (1) if the administrator finds that he has failed without sufficient cause either to apply for available, suitable work when directed so to do by the public employment bureau or the administrator, or to accept suitable work when offered him by the public employment bureau or by an employer, such ineligibility to continue for the week in which such failure occurred and for the next four following weeks. Suitable employment shall mean either employment in his usual employment or other employment for which he is reasonably fitted, provided such employment is within a reasonable distance of his residence, and, in determining whether or not any work is suitable for an

individual, the administrator may consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training and experience, his skills, his previous wage level and his length of unemployment, but, notwithstanding any other provision of this chapter, no work shall be deemed suitable nor shall benefits be denied under this chapter to any otherwise eligible individual for refusing to accept work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout or other labor dispute; (b) if the wages, hours or other conditions of work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization; . . . . "

Conn. Gen. Stat. §31-238. "Unemployment commission.

(a) The governor shall appoint six persons, one for each of the following districts: First district, consisting of the county of Hartford; second district, consisting of the counties of Middlesex, New London, Tolland and Windham; third district, consisting of the towns of Bethany, Branford, Cheshire, East Haven, Guilford, Hamden, Madison, Meriden, Milford, New Haven, North Branford, North Haven, Orange, Wallingford, West Haven and Woodbridge, in the county of New Haven; fourth district, consisting of the county of Fairfield, and fifth district, consisting of the county of Litchfield and the towns of Ansonia, Beacon Falls, Derby, Middlebury, Naugatuck, Oxford, Prospect, Seymour, Southbury, Waterbury and Wolcott, in the county of New Haven, and one for the state at large, to be known, collectively, as the unemployment commission. The term of office of such commissioners shall be five years from the first day of January next succeeding the date of appointment. During the month of October, annually, the governor shall appoint a successor to the unemployment commissioner whose term expires on the January first next following. After notice and public hearing, the governor may remove any commissioner for cause and for the good of the public service. Any vacancy shall be filled by appointment by the governor for the

unexpired portion of the term. Each commissioner shall be paid from the employment security administration fund a salary to be fixed by the governor and the commissioner of finance and control, and shall be reimbursed for any necessary expenses incurred in the discharge of his duties. During the month of January in each year, the governor shall designate a member of said commission to be its chairman, who shall receive for his services as chairman such additional salary as may be fixed by the governor and the commissioner of finance and control. The governor may appoint, for terms designated by him but expiring not later than six months after the date of such appointment, such additional commissioners as may be necessary to handle a congestion of appeals. Such additional commissioners shall have the same powers in the hearing and disposition of appeals as the commissioner in whose district they are sitting.

(b) The chairman shall be the executive head of the unemployment commission, and in addition to the usual powers and duties of that office he may employ such persons and make such expenditures and take such other action as may be necessary or suitable for the proper functioning of the commission and may delegate to any unemployment commissioner or any person employed by the commission such authority as he deems reasonable and proper for the effective administration of his duties. He shall assign commissioners and additional commissioners to such duties in such parts of the state as he deems necessary for the proper functioning of the commission. If any commissioner or additional commissioner dies or his term ends before the final settlement of any matter in which he has been acting in his official capacity, his successor in office or a commissioner designated by the chairman may continue such matter to its completion. The chairman shall have power to certify to official acts. (c) The expenses of administration of the commission shall be paid from the employment security administration fund by the treasurer, notwithstanding the provisions of section 4-86, on warrants drawn by the comptroller at the direction of the chairman of the commission."

Conn. Gen. Stat. §31-241. "Initial determination. Appeal.

The administrator, or a deputy or representative designated by

him and hereinafter referred to as an examiner, shall promptly examine the initiating claim and, on the basis of the facts found by him, shall determine whether or not such claim is valid and, if valid, the weekly amount of benefits payable and the maximum possible duration thereof. He shall promptly notify the claimant of the decision and the reasons therefor, which notification shall set forth the provision of this section for appeal. The administrator, or deputy or representative designated by him and hereinafter referred to as an examiner, shall promptly examine each claim for a benefit payment for a week of unemployment and, on the basis of the facts found by him, shall determine whether or not the claimant is eligible to receive such benefit payment for such week and the amount of benefits payable for such week. He shall promptly notify the claimant, and the employers against whose merit rating accounts compensable separations due to any benefits awarded by the decision might be charged, of the decision and the reasons therefor, which notification shall set forth the provision of this section for appeal, provided any employer who claims that the claimant is ineligible for benefits because his unemployment is due to the existence of a labor dispute at such employer's factory, establishment or other premises, shall be notified of the decision and the reasons therefor, whether or not a compensable separation due to benefits awarded by the decision might be charged against such employer's merit rating account. The state and any political subdivision subject to this chapter shall be notified of any decision on a claim in which it is designated as a base period employer. Such decision shall be final and benefits shall be paid or denied in accordance therewith unless the claimant or any of such employers, within seven days after such notification was mailed to his last-known address, exclusive of any Sundays or holidays falling within such period, files an appeal from such decision and applies for a hearing. If the last day for filing an appeal falls on any day when the offices of the employment security division are not open for business, such last day shall be extended to the next business day. If a hearing is requested, the payment of any benefits that might be affected thereby shall be made only after final determination by a commissioner. No examiner shall participate in any case in

which he is an interested party. Any person who has filed a claim for benefits pursuant to an agreement entered into by the administrator with the proper agency under the laws of the United States, whereby the administrator makes payment of unemployment compensation out of funds supplied by the United States, may in like manner file an appeal from the decision on such claim and apply for a hearing, and the United States or the agency thereof which had employed such person may in like manner appeal from the decision on such claim and apply for a hearing."

Conn. Gen. Stat. §31-242. "Appeal from examiner's decision.

Unless such appeal is withdrawn, a commissioner shall hear the claim, de novo, and render a decision thereon. Notice, by mail or otherwise, of the time and place of such hearing shall be given each interested party not less than five days prior to the date appointed therefor. The parties, including the administrator, shall be notified of the commissioner's decision, which notification shall be accompanied by a finding of the facts upon which the decision is based. Such hearing shall be held by the commissioner appointed for the congressional district in which is located the employment bureau or branch at which the claim was originally filed, or, at the discretion of the chairman, by such other commissioner as may be designated by the chairman, except that, at the discretion of the commissioner in whose congressional district the appeal is to be heard, and with the approval of the chairman of the unemployment commission, two additional members of the commission or additional commissioners, as designated by the chairman, may sit at such hearing and a majority of said three commissioners shall decide such appeal. No commissioner shall hear an appeal if he has a direct or indirect interest in the business of any party to the proceeding."

Conn. Gen. Stat. §31-243. "Continuous jurisdiction.

Jurisdiction over benefits shall be continuous but the initiating of a valid appeal under Section 23 of this act or the pendency of valid appellate proceedings under Section 26 of this act shall, if the appellate tribunal has taken jurisdiction, stay any proceeding hereunder, but only in respect to the same period and the same parties,

but shall not cause the cessation of payment of benefits as provided by section 31-242. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the administrator, or the examiner designated by him, may, at any time within six months after the date of the original decision, or within such other time limits as may be applicable under section 31-273, review an award of benefits or the denial of a claim therefor, in accordance with the procedure prescribed in respect to claims, and may issue a new decision, which may award, terminate, continue, increase or decrease such benefits. Such new decision shall be appealable under the provisions of section 31-242. Within the time prescribed in section 31-241, and where the claimant has been free from fault, a redetermination or new decision shall not effect benefits paid under a prior order.

Conn. Gen. Stat. §31-274. "Saving Clause.

" . . . (c) The provisions of this chapter shall be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases . . . . "

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LARRY STEINBERG, *et al.*
Plaintiffs

vs.

JACK A FUSARI, *Commissioner of Labor*, The Administrator, Unemployment Compensation Act, State of Connecticut
Defendant

Civil Action No. 15,104

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Jack A. Fusari, Commissioner of Labor, The Administrator, Unemployment Compensation Act, State of Connecticut, defendant above named, hereby appeals to the Supreme Court of the United States from the Judgment finding that the defendant's "seated interview" system as currently used for terminating or suspending the payment of Unemployment Compensation benefits does not provide minimal due process under the Fourteenth Amendment to the Constitution, and from the Injunction issued on September 17, 1973, filed on September 25, 1973, whereby the defendant and his successors in office, agents, and employees are enjoined from administering Chapter 567, Connecticut General Statutes (Section 31-222 *et seq.)* in such a manner as to deprive members of the plaintiff class of Unemployment Compensation benefits without first according them a constitutionally sufficient prior hearing.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk is requested to prepare a transcript of the entire record in this cause for certification and transmission to the Clerk of the Supreme Court of the United States.

Dated: October 5, 1973.

ROBERT K. KILLIAN
Attorney General of the State of Connecticut

DONALD E. WASIK
Assistant Attorney General

Defendant's Attorneys
Employment Security Division
Labor Department (AG-7)
Hartford, Connecticut 06115
Tel: (203) 566-3990

AFFIDAVIT OF PROOF OF SERVICE

I, DONALD E. WASIK, being first duly sworn, depose and say that I am an Assistant Attorney General for the State of Connecticut and the attorney for the defendant in the above entitled case, and I hereby certify that on the 5th day of October, 1973, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto as follows:

On the plaintiffs, Larry Steinberg, Cecil Paskewitz, Delia Triana and Juan Miranda by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record as follows:

To Raymond J. Kelly, Esq., Tolland-Windham Legal Assistance Program, 756 Main Street, Willimantic, Connecticut and

To John Creane, Esq., 555 Naugatuck Avenue, Milford, Connecticut, attorneys for all plaintiffs including class plaintiffs.

Donald E. Wasik

Attorney for the Defendant

Subscribed and sworn to before me this 5th day of October, 1973.

Robert M. Murphy

Commissioner of the Superior Court

FILED
Oct 8, 8:34 AM, '73
U.S. DISTRICT COURT
NEW HAVEN, CONN.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

JACK A. PUGLISI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant,

v.

LARRY STEPHENS, et al

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Appeal Docketed November 13, 1973

Jurisdiction Noted February 19, 1974

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JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act.

Appellant,

v.

LARRY STEINBERG, et al

Appellees.

Relevant Docket Entries

* * * *

1972

6/12 Complaint filed.

8/ 7 Motion to Dismiss filed.

8/ 7 Motion for Order Determining this Action is not a Class Action filed by defendant.

* * * *

9/11 Motion to Intervene filed by Mary Delicato, Dilly LaPietra, Margaret Hoadley, Judith Roy, Shirley Gonzales and Leo E. Hart.

* * * *

9/18 Motion to Determine the Propriety of Class Action filed by plaintiffs.

9/19 Motion to Intervene as Plaintiffs filed by Delia Triana, Luis Rodriguez, Primitivo Comacho and Juan Miranda.

9/19 Motion for Preliminary Injunction filed by Delia Triana, Luis Rodriguez, Primitivo Comacho and Juan Miranda.

9/19 Motion to Intervene as Plaintiffs filed by Jose M. Lopez and Juan Lopez.

9/19 Motion for Preliminary Injunction filed by Jose M. Lopez and Juan Lopez.

9/22 Objection to Motion to Intervene filed by defendant.

9/25 Objection to Motion to Intervene filed by defendant.

* * * *

10/ 2 Hearing on (1) Defendant's Motion to Dismiss; (2) Defendant's Motion for Order Determining this Action is not a Class Action; (3) Motion of Mary Delicato, Dilly LaPietra, Margaret Hoadley, Judith Roy, Shirley Gonzales and Leo E. Hart to Intervene; (4) Plaintiffs' Motion to Determine the Propriety of Class Action; (5) Motion of Delia Triana, Luis Rodriguez, Primitivo Comacho and Juan Miranda to Intervene as Plaintiffs; (6) Motion of Delia Triano, et als for Preliminary Injunction; (7) Motion of Jose M. Lopez, et al for Preliminary Injunction; (8) Motion of Jose M. Lopez, et al for Preliminary Injunction; * * * (10) Defendant's Objection to Motions to Intervene dated 9/7/72; and (11) Defendant's Objection to Motion to Intervene dated 9/19/72; * * * Decision Reserved on all eleven motions. Newman, J. M-10/3/72.

10/10 Motion for Hearing to Present Testimony Regarding Motions for Preliminary Injunction and Notice of Motion, filed by defendant.

10/16 Hearing re Defendant's Motion to Present Testimony regarding Motions for Preliminary Injunction. Affidavits of D. S. Ballew and Delia Triana, filed by Defendant. Defendant's witnesses Mrs. Vivienne Goldstein, Mildred P. Cogswell and Carl D. Eisenman sworn and testified, * * * Decision Reserved. Newman, J. M-10/17/72.

10/19 Affidavit of Carl D. Eisenman filed.

10/20 Affidavit by Juan Lopez filed.

10/20 Application for Convening of a Three-Judge District Court, filed by plaintiffs and intervening plaintiffs.

10/20 Supplementary Affidavit of Primitivo Comacho filed.

10/20 Supplementary Affidavit of Juan Miranda filed.

10/20 Supplementary Affidavit of Delia Triana filed.

* * * *

11/ 6 Hearing on Plaintiffs' and Intervening Plaintiffs' Application for Convening a Three-Judge Court. Plaintiffs and Intervenors orally withdraw their claims for retroactivity. Decision Reserved. Newman, J. M-11/6/72.

11/13 Memorandum of Decision on Motions to Convene Three-Judge Court, to Intervene, to Dismiss and for Temporary Injunction, entered. Plaintiffs' request for determination of this suit as a class action will be deferred for consideration by the Three-Judge Court. The motions to intervene filed by Hart, Gonzales, Roy, Hoadley, LaPietra, Delicato, Comacho, Rodriguez, Jose Lopez, and Juan Lopez are denied; the motion to intervene as plaintiffs filed by Miranda and Triana are granted; the defendant's motion to dismiss is denied; the plaintiffs' motion to convene a three-judge court is granted; and the intervening plaintiffs motion for temporary injunctive relief is denied. Newman, J. M-11/14/72.

* * * *

11/13 Intervening Complaint of Delia Triana and Juan Miranda filed. * * *

* * * *

11/30 Motion for Production of Documents filed by plaintiffs.

12/ 4 Motion for Leave to File Supplemental Matter in an Amended Complaint, endorsed as follows: "Motion granted, absent objection." Newman, J. M-12/4/72.

12/ 4 Amended Complaint filed.

* * * *

12/ 8 Interrogatories to the Defendant and Requests to Produce filed by plaintiffs.

12/18 Objection to Interrogatories and Requests to Produce filed by defendant. * * *

1973

* * * *

1/22 Answer to Amended Complaint filed by defendant.

2/ 6 Answer to Motion for Production of Documents filed by defendant.

* * * *

3/ 1 Answer to Interrogatories and Requests to Produce together with documents, filed by defendant.

* * * *

3/26 Claim for Three-Judge Court Trial List filed by plaintiffs.

3/26 Tapes of Depositions of Eleanor H. Smarz and Commissioner Loughlin filed.

3/28 Deposition of Eleanor H. Smarz filed.

3/28 Deposition of Commissioner Loughlin filed.

4/ 2 Motion to Redetermine the Propriety of a Class Action filed by plaintiffs.

4/16 Objection to Motion to Redetermine the Propriety of a Class Action filed by defendant.

4/16 Hearing on Plaintiffs' Motion to Re-Determine the Propriety of a Class Action. Decision Reserved. * * * Newman, J. M-4/18/73.

4/16 Plaintiffs' Motion to Redetermine the Propriety of a Class Action, endorsed as follows: "Motion referred for consideration by the three-judge court." Newman, J. M-4/17/73.

* * * *

5/14 Three-Judge Court Hearing on the Merits. 1 Plaintiff's witness sworn and testified. Stipulation to facts filed. Stipulation as to Plaintiffs' Exhibits filed. Stipulation to Depositions filed. (Exhibits 8 and 9) Plaintiffs' Exhibits 1 thru 31 filed. Plaintiffs' List of Exhibits 1-30 filed. Defendant's Exhibits A thru E filed. 1 Defendant's witness sworn and testified.

* * * *

5/17 Affidavit of Juan Miranda, Sept. 6, 1972; Supplementary Affidavit of Juan Miranda, Oct. 18, 1972; Affidavit of Delia Triana, Sept. 12, 1972; and Supplementary Affidavit of Delia Triana, Oct. 18, 1972 to be marked as Plaintiffs' Exhibit 32, filed by plaintiff.

6/ 5 Proposed Consent Order filed by Defendant.

6/ 5 Affidavit of Theodore W. Hatcher filed by Defendant.

* * * *

9/17 Memorandum of Decision entered. "This suit presents the question of whether either the Fourteenth Amendment, or § 303 of the Social Security Act, 42 U.S.C. § 503 (a) (1), requires that recipients of Conn. unemment compensation benefits be afforded a *Goldberg v. Kelly* (397 U.S. 254 (1970)) hearing prior to being deprived of such payments, etc. ***, we conclude that the Connecticut System fails to meet minimal due process standards and therefore must be enjoined. Rule 23 (b) (2)'s requirement are met, and we designate this a class action. In summary, we find that the "seated interview" system as currently used for terminating or suspending the payment of unemployment compensation benefits does not provide minimal due process under the 14th Amendment to the Constitution. We accordingly enjoin the defendant Administrator, his successors in office, agents, etc. from administering Chapter 567, Conn. Gen. Stat. (§ 31-222 *et seq.*) in such a manner as to deprive members of the plaintiff class of unemployment benefits without first according

them a constitutionally sufficient prior hearing. This opinion shall serve as the Court's findings of fact and conclusions of law, under Fed. R. Civ. P. 52(a)." Smith, C. J.; Blumenfeld, D. J.; Newman, D. J. M-9/17/73.

***

9/25 Motion for Suspension of Injunction Pending Appeal filed by defendant.

9/25 Judgment entered that the defendant Administrator, his successors, etc. are enjoined from administering Chap. 567, Conn. Gen. Stat. (§ 31-222 *et seq.*) in such a manner as to deprive members of the plaintiff class of unployment benefits without first according them a constitutionally sufficient prior hearing. Markowski, C. Approved: Smith, C. J. ; Blumenfeld, D. J.; Newman, D. J. M-9/25/73.

10/ 1 Hearing on Motion for Stay Pending Appeal to Supreme Court. Argument by Counsel for Plaintiff and Defendant. Decision Reserved. Newman, J. M-10/2/73.

10/ 3 Order entered that the injunction issued by this Court on September 17, 1973, is stayed pending disposition of defendant's appeal by the Supreme Court, provided that defendant file a notice of appeal with this Court by October 9, 1973, and file a jurisdictional statement with the Supreme Court by November 9, 1973. Smith, C. J.; Blumenfeld, D. J.; Newman, D. J. M-10/4/73.

* * * *

10/ 9 Notice of Appeal to the Supreme Court of the United States filed by defendant.

* * * *

11/13 Appeal docketed.

12/ 3 Clerk's Certificate.

1974

2/19 Jurisdiction noted.

2/19 Order entered granting Motion to Proceed in forma pauperis.

EXHIBIT B

Case 1161-B-71

UNEMPLOYMENT COMMISSION

LARRY S. STEINBERG
Rt. 44, RFD No. 1
West Willington,
Connecticut 06279
045-36-2590

SECOND DISTRICT

Mailing date
May 10, 1972

vs.

THE ADMINISTRATOR
UNEMPLOYMENT
COMPENSATION ACT

Local office 18

APPEARANCES: Douglas M. Crockett, Esq. for the claimant. Bernard Gerling for the Administrator.

The claimant registered for work and filed a new claim for unemployment benefits as of April 11, 1971. On November 1 the examiner disapproved claims from October 10 on the ground of unavailability. The claimant's appeal, dated November 5, was assigned for hearing on December 2, 1971, postponed at the request of the claimant and held on January 13, 1972 at Willimantic, Connecticut.

FINDING OF FACTS

1. The claimant is a single man 25 years old. He has a bachelor's degree from the University of Connecticut. His major field of study was geography.

2. He worked as an ironmaker for Scherer Steel Company from sometime in 1969 to May, 1970.

3. The claimant registered for work and filed a new claim for unemployment benefits as of April 17, 1971. In the interim after May of 1970 he had been ill.

4. On April 26, 1971 the claimant was seated and was interviewed by an examiner who told him of his rights and responsibilities under the Unemployment Compensation Law, including the responsibility to reasonably seek work during every week for which benefits are claimed.

5. The claimant then received benefits for 26 weeks at $82 a week, through October 9, 1971.

6. On June 29 the claimant was again seated and interviewed by an examiner, who told him to keep a list of places where he looked for work.

7. On August 24 he was again seated and interviewed by an examiner who told him he must expend the scope of his efforts to find work, which up to that time had been mainly to telephone or go to Locals 37 and 424 of the Ironworkers Union.

8. On October 27 the claimant was again seated and interviewed by an examiner. He told the examiner that except for an inquiry at Brand Rex in May, 1971, all his efforts to obtain work had been through the hiring halls of the Ironworkers Union. In the week ending October 23 he had gone to the hall of Local 37 in Providence and had telephoned to Local 424 in New Haven and Local 15 in Hartford. He stated that he would accept only union work. He is not a union member but can work on a permit after all union card holders who want work are placed.

9. The above was summarized in writing and the claimant signed the information as true and correct.

10. The claimant was not given unemployment checks on October 27 for the weeks ending October 16 and 23, 1971, which would have been given to him if his claims had been approved as they had been in previous weeks back to April 26. He was told that his checks would be held and that he would get a decision in the mail.

11. If the claimant had asked for an immediate written decision on the disapproval of his claims it would have been given to him on that day. This is the policy and practice of the Unemployment Compensation Department.

12. Because he did not ask for a written decision on that day the examiner mailed him a decision on November 1 disapproving his claims from October 10. From this decision the claimant appealed on November 5.

13. A hearing of this appeal was assigned for December 2, 1971. At the claimant's request the hearing was postponed to January 13, 1972.

14. The claimant worked for Trahan Seafoods from November 22 to December 22, 1971. He was laid off due to lack of work.

15. He filed a partial claim for the week ending December 25, 1971 which was paid in the amount of $53.

16. He received unemployment benefits in subsequent weeks and has continued to receive them to the date of this finding of facts, at $82 a week.

17. The claimant contends that he had no opportunity to be heard prior to the stopping of his benefits effective October 10, 1971.

18. Notice is taken here of the policy and practice of the Unemployment Compensation Department. The policy is never to disapprove a claim until after at least one seated interview. At periodic interviews the examiner inquires of the claimant about any restrictions he may be placing on his availability in the labor market. The examiner also inquires where the claimant has looked for work. The claimant is informed that the Law requires he look for work. He is also informed that if he does not meet the eligibility requirements of the Law he will not receive checks.

19. This policy and practice was followed with this claimant.

20. The claimant was given not one but several hearings on his benefit eligibility status. At each of the seated interviews on April 26, June 29, August 24 and October 27 the claimant had every opportunity to present information favorable to his version of the facts in his situation.

21. The claimant's contention that he had no opportunity to be heard prior to the stopping of his benefits effective October 10 must fall in the light of the facts found. The Department's policy and practice are reasonably calculated to ensure that benefits are paid when due.

22. It is further found that had he continued to receive benefits he would not have made any more efforts to obtain work in subsequent weeks than he had made up to October 27.

23. His failure to make greater efforts to obtain work than he did make, after having been unemployed for a year and five months, leads to the conclusion that the claimant was restricting himself to employment as a union ironworker. He failed to expose himself unequivocally to the labor market and rendered himself unavailable for work within the meaning of the Law, because he was not ready, willing and able to accept work which he did not have good cause to refuse.

24. It is further found that the claimant, during the weeks in issue, from October 10 to November 20, failed to make reasonable efforts to obtain work.

DECISION

The Unemployment Compensation Law provides, among its conditions of eligibility for benefits, that a claimant must be available for work and that he must make reasonable efforts to obtain work during each week for which benefits are sought. The claimant, during the period at issue, is found not to have met this condition. It is held that he was correctly declared ineligible for benefits from October 10 through November 20, 1971. The examiner's decision is affirmed.

THADDEUS J. PAWLOWSKI
Commissioner, Second District

The only appeal from this decision is to Superior Court. Six copies of such appeal must be filed with the Unemployment Commission within 14 days of the date of this decision. Such appeal must state the grounds on which you assert that the decision is incorrect.

MEMORANDUM

The question raised by counsel as to whether due process of law was denied to the claimant by reason of his checks for unemployment benefits being withheld from him without a hearing, is one of deep interest. Notice has been taken of the policy and practice of the Unemployment Compensation Department as being reasonably calculated to ensure payment of benefits when due. Attention should be given to the phrase *any week* with respect to (Section 31-325) Connecticut General Statutes. Benefits are paid or denied based on what happens during a given week. If a claimant has not met the benefits eligibility conditions, benefits are not due. Only after the week has elapsed can a decision on entitlement for such week be made. The Department takes pains and expends time and energy to inform all claimants of what their rights and responsibilities are under the Law. As to the claimant's contention that he was not heard, he is a college graduate and if he did not understand what the examiner said to him on four different occasions, he was not paying attention.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

(Title Omitted in Printing)

AMENDED COMPLAINT

Introduction

Plaintiffs bring this suit to challenge several aspects of Connecticut's unemployment compensation procedures. First, plaintiffs challenge Connecticut's policy of terminating, withholding, or suspending unemployment benefits of persons who have been determined eligible and subsequently ineligible pursuant to an administrative decision without a prior hearing which meets the due process requirements set forth in *Goldberg v. Kelly*, 397 U.S. 254. Plaintiffs maintain that this policy, authorized by Conn. Gen. Stats. §§31-241 and 31-243 denies plaintiffs due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution and further violates the "payment when due" provision of the Social Security Act, 42 U.S.C. §503 (a)(1). Second, plaintiffs challenge the "work effort" provisions of Conn. Gen. Stats. §§31-235(a) and 31-236(1) and defendant's implementation of said statutes on the ground that these provisions, as enacted and as applied to plaintiffs and others similarly situated, are unconstitutionally vague, have operated to deny plaintiffs unemployment benefits without due process of law and as enacted and applied conflict with §503(a)(1) of the Social Security Act.

1. Plaintiffs, individually and on behalf of all others similarly situated, bring this suit to redress the deprivation of rights secured by the Fourteenth Amendment to the United States Constitution and by the Social Security Act of 1935, as amended, 42 U.S.C. §501 et seq.

2. Plaintiffs seek a declaratory judgment declaring Conn. Gen. Stats. §§31-235(2), 31-236(1), 31-241 and 31-243 unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and invalid as inconsistent with the Social Security Act, 42 U.S.C. §503(a)(1). Plaintiffs further seek an injunction enjoining defendant from

suspending, terminating, or withholding the unemployment benefits of persons who have filed, or will file, valid initiating claims pursuant to Conn. Gen. Stats. §§31-230, 31-235(1)(3) and 31-241 without affording said persons a prior hearing which satisfies the due process requirement set forth in *Goldberg v. Kelly*. (Copies of Conn. Gen. Stats. §§31-230, 31-235, 31-236(1), 31-241 and 31-243 are attached to this Amended Complaint as Attachment A).

3. Jurisdiction is conferred on this Court by Title 28 U.S.C. §1343.

4. Plaintiffs' action for injunctive and declaratory relief is brought pursuant to Title 42 U.S.C. §1983, 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

5. Plaintiffs bring this action pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of themselves and all persons similarly situated. The members of this class are so numerous as to make joinder of all of them impractical. The class is composed of all present and future unemployed workers in Connecticut who have filed valid initiating claims for unemployment compensation benefits pursuant to Conn. Gen. Stats. §§31-230, 31-235(1)(3) and 31-241 and whose benefits have been or will be terminated, suspended, or withheld by defendant pursuant to Conn. Gen. Stats. §§31-241 and 31-243 without affording said persons a *Goldberg v. Kelly* prior hearing, excepting those persons who from time to time exhaust their entitlement to those benefits by virtue of the operation of Conn. Gen. Stats. §31-236. This class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative parties will fairly and adequately protect the interest of the class and; the defendant and his agents and employees have acted and refused to act on grounds generally applicable to the class thereby making appropriate declaratory and injunctive relief with respect to the class as a whole.

PARTIES

6. Plaintiff Larry Steinberg is a citizen of the United States and a resident of West Willington, Connecticut.

7. Plaintiff Cecil Paskewitz is a citizen of the United States and a resident of Somers, Connecticut.

8. Plaintiff Juan Miranda is a citizen of the United States and a resident of Bridgeport, Connecticut.

9. Plaintiff Delia Triana is a refugee from Cuba who has applied for permanent residency in the United States. She resides in Bridgeport, Connecticut.

10. Defendant Jack A. Fusari, sued in his individual and official capacity, is the Commissioner of Labor for the State of Connecticut. Under Connecticut General Statutes, §31-1, he is designated as the individual responsible for administering the Unemployment Compensation Act of the State of Connecticut.

11. Under the Connecticut Unemployment Compensation Statute, Conn. Gen. Stats. §31-222 et seq., an initial determination of eligibility is made after an unemployed claimant files an initiating claim and a claim examiner determines, pursuant to Conn. Gen. Stats. §31-241, that the claim is valid.

12. The statutory provisions relating to the initial determination of eligibility provide, in relevant part, as follows:

Conn. Gen. Stats. §31-230

> . . . . As used in this section an initiating claim shall be deemed valid if the claimant is unemployed and meets the requirements of subsections (1) and (3) of section 31-235.

Conn. Gen. Stats. §31-235 — *Benefits eligibility conditions; qualifications.*

> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that:
>
> (1) he has made claim for benefits in accordance with the provisions of section 31-240 and has registered for work at the public employment bureau or other agency designated by the administrator within such time limits, with such frequency and in such manner as the administrator may prescribe, provided failure to comply with

> this condition may be excused by the administrator upon a showing of good cause therefor; . . . . .
>
> (3) he has been paid wages by an employer who was subject to the provisions of this chapter during the base period of his current benefit year in an amount at least equal to thirty times his benefit rate for total unemployment, some part of which amount has been paid or was earned in at least two different calendar quarters of such base period.

Conn. Gen. Stats. §31-241 — *Initial determination*

> The administrator, or a deputy or representative designated by him and herinafter referred to as an examiner, shall promptly examine the initiating claim and, on the basis of the facts found by him, shall determine whether or not such claim is valid and, if valid, the weekly amount of benefits payable and the maximum possible duration thereof.

13. After an initial determination of eligibility is made by defendant, the claimant customarily reports bi-weekly at his local unemployment compensation office to receive his benefit checks for the preceding two-week period.

14. Plaintiff Steinberg filed an initiating claim for unemployment benefits on or about April 17, 1971, was declared eligible and received weekly benefits through October 9, 1971.

15. On October 27, 1971, plaintiff Steinberg reported to the unemployment compensation office to receive his benefits for the weeks ending October 16 and 23, 1971. Following an informal discussion with an unemployment office "interviewer" in November, Mr. Steinberg was told he would not receive his unemployment checks.

16. On November 16, 1971 Steinberg received written notice that he was disqualified retroactive to October 10, 1971 for failure to be "available for work" and make "reasonable efforts to obtain work", as required by Conn. Gen. Stats. §31-235(2).

17. On November 5, 1971 plaintiff Steinberg appealed the termination of benefits. A hearing was held before an ap-

peals Commissioner on January 3, 1972 and the Commissioner subsequently upheld the termination of benefits.

18. Plaintiff Paskewitz filed an initiating claim for unemployment compensation benefits in August, 1971, was declared eligible and received benefits until February, 1972.

19. On February 16, 1972, Paskewitz's application for extended benefits pursuant to Conn. Gen. Stats. §31-232(b) was approved.

20. On March 2, 1972 plaintiff Paskewitz went to the Enfield Unemployment office to collect his first checks for Extended Benefits and was told that his payments were being suspended or terminated as the Unemployment Compensation Department had made an error in the determination of his eligibility. When Mr. Paskewitz inquired as to the specific reason for this action, he was told that his case was being "investigated".

21. Plaintiff Paskewitz appealed this termination on March 2, 1972. A hearing was scheduled in August, 1972 but was postponed at the request of Mr. Paskewitz's attorney. The appeal was heard on October 11, 1972, but to date, the Commissioner has not rendered a decision.

22. Plaintiff Triana filed an initiating claim for unemployment benefits on or about June 18, 1972, was determined eligible, and received weekly benefits through July 8, 1972.

23. On July 27, 1972, Mrs. Triana went to the Bridgeport Unemployment Compensation office to receive her benefits checks for the weeks ending July 15 and July 22, 1972.

24. After speaking briefly with an unemployment office "interviewer", Mrs. Triana was told that her benefits were being terminated indefinitely, retroactive to July 9, 1972, because she had not made "reasonable efforts to find work". (Plaintiff Triana's affidavit, dated September 12, 1972, already on file with this Court, is hereby incorporated as if fully pleaded herein).

25. On or about August 7, 1972, Triana filed an appeal on the termination of benefits. Because of the large backlog of pending appeals, totaling 6,100 state-wide as of August 31, 1972,

her appeal was not heard by an unemployment Commissioner until October 27, 1972.

26. On November 10, 1972, the Commissioner rendered his decision. The Commissioner's findings of fact included a finding that Mrs. Triana "was desperate for work and sought all types of work in the local labor market." The Commissioner's decision was that Mrs. Triana was incorrectly declared ineligible for the four weeks between July 29, 1972 and August 18, 1972 and that she was entitled to benefits for that period. (A copy of the Commissioner's decision is attached to this Amended Complaint as Attachment B).

27. Plaintiff Triana was scheduled to receive the wrongfully withheld benefits on November 27, 1972 but on that date was told that release of the checks had not yet been approved.

28. Plaintiff Miranda filed an initiating claim for unemployment benefits on July 2, 1972, was determined eligible and received benefits through August 12, 1972.

29. On August 27, 1972, Mr. Miranda reported to the Bridgeport Unemployment Compensation office to receive his benefit checks for the weeks ending August 19 and 26, 1972. Following a brief discussion with a department examiner, Mr. Miranda was told that he would no longer receive benefits because he had not made "reasonable efforts to find work". (Plaintiff Miranda's affidavits, dated September 6, 1972 and October 18, 1972 which are already on file with this Court, are hereby incorporated as if fully pleaded herein.)

30. On September 11, 1972, Miranda received written notice that all claims from August 13, 1972 were disapproved and on September 13, 1972 Miranda filed an appeal.

31. A fact-finding appeal hearing was held before an Unemployment Commissioner on October 17, 1972.

32. On October 24, 1972 the Commissioner rendered his written deicision and held that during all periods in question Mr. Miranda had "demonstrated a sincere effort to seek employment within the meaning of the Unemployment Compensation Act" and therefore was eligible for benefits withheld for

the eight week period from August 13, 1972 to the date of the appeal hearing. (A copy of the appeal decision is attached to the Amended Complaint as Attachment C.)

33. On November 23, 1972, plaintiff Miranda received the unemployment compensation benefits which had been wrongfully withheld from him.

34. The weekly benefits of each plaintiff were terminated, suspended, or withheld without a prior due process hearing pursuant to defendant's statewide policy, authorized by Conn. Gen. Stats. §31-241 which provides in pertinent part as follows:

> The administrator, or deputy or representative desig-signated by him and hereinafter referred to as an examiner shall promptly examine each claim for a benefit payment for a week of unemployment and, on the basis of facts found by him, shall determine whether or not the claimant is eligible to receive such benefit payment for such week and the amount of benefits payable for such week. . . . . Such decision shall be final and benefits shall be paid or denied in accordance therewith unless the claimant . . . . within seven days after such notification was mailed to his last known address . . . . files an appeal from such decision and applies for a hearing.

35. Plaintiffs Steinberg, Triana and Miranda were denied unemployment benefits for allegedly failing to comply with the statutory "work effort" requirements as set forth in Conn. Gen. Stats. §§31-235(2) and 31-236(1):

> §31-235(2)
> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that . . .
>
> (2) he is physically and mentally able to work and is available for work and has been and is making reasonable efforts to obtain work.
>
> §31-236 — Disqualifications
> "An individual shall be ineligible for benefits (1) If the administrator finds that he has failed without sufficient cause either to apply for available, suitable work when

> directed so to do by the public employment bureau or the administrator, or to accept suitable employment when offered him by the public employment bureau or by an employer, such ineligibility to continue for the week in which such failure occurred and for the next four following weeks. Suitable work shall mean either employment in his usual occupation or field or other work for which he is reasonably fitted, provided such work is within a reasonable distance of his residence, and, in determinating whether or not any work is suitable for an individual, the administrator may consider the degree of risk involved in his health, safety and morals, his physical fitness and prior training and experience, his skills, his previous wage level and his length of unemployment.

36. Upon information and belief defendant has no written standards or regulations with respect to Conn. Gen. Stats. §§31-235 (2) and 31-236(1) and the application of said statutes is left to the subjective determinations of numerous interview and claim examiners employed by defendant.

37. The lack of written standards and regulations with respect to Conn. Gen. Stats. §§31-235(2) and 31-236(1) make it difficult for claimants who are adversely affected by the operation of said statutes to receive a meaningful, due process appeal hearing before an Unemployment Commissioner.

38. Conn. Gen. Stats. §§31-235(2) and 31-236(1) are vague and arbitrary and, as enacted and as applied to Plaintiffs and members of their class, have operated to deprive them of property without due process of law.

39. Defendant's policy and practice of terminating or withholding claimants' unemployment benefits without a prior due process hearing and the overburdened appeal process, operates to deny plaintiffs and members of their class their Fourteenth Amendment right to due process of law. Said policy and practice is also in conflict with the Social Security Act, 42 U.S.C. §503(a)(1) which provides in relevant part:

> The Secretary of Labor shall make no certification of payment to any State unless he finds the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for

(1) such methods of administration as are *reasonably calculated to ensure full payment of unemployment compensation when due.* (Emphasis added).

40. Plaintiff and members of their class have suffered and will continue to suffer irreparable injury until the Defendant's above described practices and the Connecticut Statutes which authorize said practices are declared illegal and unconstitutional and are enjoined by this Court.

41. Plaintiffs and their class have no adequate administrative remedy or remedy at law.

WHEREFORE,

Plaintiffs on behalf of themselves and all others similarly situated respectfully pray that this Court:

1. Assume jurisdiction of this case and set this case down for a prompt hearing;

2. Certify, pursuant to Rule 23(a) and 23(b)(2) F.R.C.P. that this case may proceed as a class action;

3. Enter a final judgment declaring that:

(a) Defendant's practice of terminating, suspending, withholding or reducing unemployment compensation benefits of plaintiffs and members of their class who have been determined eligible and subsequently ineligible pursuant to an administrative decision without a *Goldberg v. Kelly* prior hearing, is invalid under the Social Security Act 42 U.S.C. §503(a)(1) and the Due Process Clause of the Fourteenth Amendment;

(b) Conn. Gen. Stats. §§31-241 and 31-243, insofar as they authorize defendant's practice of terminating, suspending, withholding or reducing unemployment benefits without a *Goldberg v. Kelly* prior hearing, conflict with the Social Security Act 42 U.S.C. §503(a)(1) and the Due Process Clause of the Fourteenth Amendment and are, therefore, invalid.

(c) Conn. Gen. Stats. §31-235(2) insofar as it provides that:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that . . .

> (2) he is . . . available for work and has been and is making reasonable efforts to obtain work.

conflicts with §503(a)(1) of the Social Security Act and the Due Process Clause of the Fourteenth Amendment and is therefore, invalid.

(d) Conn. Gen. Stats. §31-236(1) insofar as it provides that:

> §31-236 Disqualifications
>
> An individual shall be ineligible for benefits (1) If the administrator finds that he has failed without sufficient cause either to apply for available, suitable work when directed so to do by the public employment bureau or the administrator, or to accept suitable employment when offered him by the public employment bureau or by an employer, such ineligibility to continue for the week in which such failure occurred and for the next four following weeks. Suitable work shall mean either employment in his usual occupation or field or other work for which he is reasonably fitted, provided such work is within a reasonable distance of his residence and, in determining whether or not any work is suitable for an individual, the administrator may consider the degree of risk involved in his health, safety and morals, his physical fitness and prior training and experience, his skills, his previous wage level and his length of unemployment.

conflicts with §503(a)(1) of the Social Security Act and the Due Process Clause of the Fourteenth Amendment and is, therefore, invalid.

4. Issue a permanent injunction pursuant to Rule 65 F.R.C.P. enjoining defendant, his successors in office, agents, employees and all other persons acting in concert with them from:

(a) Suspending, withholding, terminating or reducing the unemployment benefits of plaintiffs and members of their class who have been determined eligible and subsequently ineligible pursuant to an administrative decision without a *Goldberg v. Kelly* prior hearing, and

(b) Suspending, withholding, terminating or reducing the unemployment benefits of plaintiffs and members of their class on the basis of Conn. Gen. Stats. §§31-235(2) and 31-236(1).

5. Allow plaintiffs their costs herein and grant such other and further relief as may be just and proper.

(Signatures of Counsel Omitted in Printing)

ATTACHMENT A

§ 31-230. Benefit year and base period

An individual's benefit year shall commence with the beginning of the week with respect to which he has filed a valid initiating claim and shall continue for the remainder of the calendar quarter in which such week begins and for the next three calendar quarters, plus the remainder of any uncompleted calendar week at the end of such period. The base period of a benefit year shall be the first four of the five most recently completed calendar quarters prior to such benefit year. As used in this section, an initiating claim shall be deemed valid if the claimant is unemployed and meets the requirements of subsections (1) and (3) of section 31-235. The base period of an individual's benefit year shall include wages paid by any nonprofit organization electing reimbursement in lieu of contributions, or by the state and by any town, city or other political or governmental subdivision of or in this state or of any municipality to such person with respect to whom such employer is subject to the provisions of this chapter.

(1949 Rev., § 7503; 1949, Supp. § 631a; 1953, Supp. § 2308c; 1955, Supp. § 3068d; 1969, P.A. 700, § 4; 1971, P.A. 835, § 12, eff. July 1, 1971.)

§ 31-235. Benefit eligibility conditions; qualifications

An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that

(1) he has made claim for benefits in accordance with the provisions of section 31-240 and has registered for work at the public employment bureau or other agency designated by the administrator within such time limits, with such frequency and in such manner as the administrator may prescribe, provided failure to comply with this condition may be excused by the administrator upon a showing of good cause therefor;

(2) he is physically and mentally able to work and is available for work and has been and is making reasonable efforts to obtain work.

(3) he has been paid wages by an employer who was subject to the provisions of this chapter during the base period of his current benefit year in an amount at least equal to thirty times his benefit rate for total unemployment, some part of which amount has been paid or was earned in at least two different calendar quarters of such base period.

(1949 Rev., § 7507; 1953, Supp. § 2312c; 1955, Supp. § 3072d; 1965, P.A. 550, § 4, eff. July 8, 1965; 1967, P.A. 790, § 13; 1967 Public Act 790, § 23, eff. July 1, 1967; 1971, P.A. 835, § 14, eff. July 1, 1971.)

§ 31-236. Disqualifications

An individual shall be ineligible for benefits

(1) If the administrator finds that he has failed without sufficient cause either to apply for available, suitable work when directed so to do by the public employment bureau or the administrator, or to accept suitable employment when offered him by the public employment bureau or by an employer, such ineligibility to continue for the week in which such failure occurred and for the next four following weeks. Suitable work shall mean either employment in his usual occupation or field or other work for which he is reasonably fitted, provided such work is within a reasonable distance of his residence, and, in determining whether or not any work is suitable for an individual, the administrator may consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training and experience, his skills, his previous wage level and his length of unemployment, but, notwithstanding any other provision of this chapter, no work shall be deemed suitable nor shall benefits be denied under this chapter to any otherwise eligible individual for refusing to accept work under any of the following conditions:

(a) If the position offered is vacant due directly to a strike, lockout or other labor dispute;

(b) if the wages, hours or other conditions of work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(d) if the position offered is for work which commences or ends between the hours of one and six o'clock in the morning if the administrator finds that such work would constitute a high degree of risk to the health, safety or morals of the individual, or would be beyond the physical capabilities or fitness of the individual or there is no suitable transportation available from the claimant's home to or from his place of employment.

§ 31-241. Initial determination

The administrator, or a deputy or representative designated by him and hereinafter referred to as an examiner, shall promptly examine the initiating claim and, on the basis of the facts found by him, shall determine whether or not such claim is valid and, if valid, the weekly amount of benefits payable and the maximum possible duration thereof. He shall promptly notify the claimant of the decision and the reasons therefor, which notification shall set forth the provision of this section for appeal. The administrator, or deputy or representative designated by him and hereinafter referred to as an examiner, shall promptly examine each claim for a benefit payment for a week of unemployment and, on the basis of the facts found by him, shall determine whether or not the claimant is eligible to receive such benefit payment for such week and the amount of benefits payable for such week. He shall promptly notify the claimant, and the employers against whose merit rating accounts compensable separations due to any benefits awarded by the decision might be charged, of the decision and the reasons therefor, which notification shall set forth the provision of this section for appeal, provided any employer who claims that the claimant is ineligible for benefits because his unemployment is due to the existence of a labor dispute at such employer's factory, establishment or other premises, shall be notified of the decision and the reasons therefor, whether or not a compensable separation due to benefits awarded by the decision might be charged against such employer's merit rating account. The state and any political subdivision subject to this chapter shall be notified of any decision on a claim in which it is designated as a base period employer. Such decision shall be final and benefits shall be paid or denied in accordance therewith unless the claimant or any of such employers, within seven days after such notification

was mailed to his last-known address, exclusive of any Sundays or holidays falling within such period, files an appeal from such decision and applies for a hearing. If the last day for filing an appeal falls on any day when the offices of the employment security division are not open for business, such last day shall be extended to the next business day. Where the administrator or examiner has determined that the claimant is eligible for benefits and the employer has initiated an appeal under the provisions of section 31-242, a hearing shall be forthwith granted upon the application of the claimant to the administrator or examiner concerned for the payment of benefits during the pendency of the appeal before the unemployment compensation commissioner. For good cause shown the administrator or examiner may allow the payment of benefits, as long as the claimant shall be otherwise eligible therefor, during the pendency of the appeal before the unemployment compensation commissioner, and until such time as the said commissioner has rendered his decision on appeal. No examiner shall participate in any case in which he is an interested party. Any person who has filed a claim for benefits pursuant to an agreement entered into by the administrator with the proper agency under the laws of the United States, whereby the administrator makes payment of unemployment compensation out of funds supplied by the United States, may in like manner file an appeal from the decision on such claim and apply for a hearing, and the United States or the agency thereof which had employed such person may in like manner appeal from the decision on such claim and apply for a hearing.

(1949 Rev., § 7513; 1955, Supp. § 3077d; 1957, P.A. 596, § 5; 1965, P.A. 347; 1967, P.A. 790, § 15; 1971, P.A. 835, § 22, eff. July 1, 1971.)

§ 31-243. Continuous jurisdiction

Jurisdiction over benefits shall be continuous but the initiating of a valid appeal under section 31-242 or the pendency of valid appellate proceedings under section 31-249 shall, if the appellate tribunal has taken jurisdiction, stay any proceeding hereunder, but only in respect to the same period and the same parties, but shall not cause the cessation of payment of benefits as provided by section 31-242. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the administrator, or the examiner designated by

him, may, at any time within six months after the date of the original decision, or within such other time limits as may be applicable under section 31-273, review an award of benefits or the denial of a claim therefor, in accordance with the procedure prescribed in respect to claims, and may issue a new decision, which may award, terminate, continue, increase or decrease such benefits. Such new decision shall be appealable under the provisions of section 31-242 within the time prescribed in section 31-241, and where the claimant has been free from fault, a redetermination or new decision shall not affect benefits paid under a prior order.

(1949 Rev., § 7515; 1971, P.A. 835, § 24, eff. July 1, 1971.)

ATTACHMENT B

Case No. 2671-D-72

Delia F. Triana
153 Lewis Street
Bridgeport, Connecticut
SS No. 048-48-0259

vs

The Administrator
Unemployment
Compensation Act

UNEMPLOYMENT COMMISSION
285 Golden Hill Street
Bridgeport, Connecticut 06604

LOCAL OFFICE NO. 2

Mailing Date
November 10, 1972

APPEARANCES: The claimant, together with Mrs. Margarita Torres, interpreter, and Attorney John Creane, from Legal Services. Mr. John Blair, Fact Finding Examiner, for the Administrator.

The claimant filed a Total Additional Claim for benefits as of June 18, 1972. On July 27, 1972, the Administrator disapproved all claims from July 9, 1972 to Indefinite. Claimant's appeal dated August 7, 1972, was heard in Bridgeport on October 27, 1972.

FINDING OF FACTS

1. Claimant is forty-five years of age, married, four children, ages eight, ten, thirteen, and fifteen.

2. Claimant is not employed at present, and is available for full-time work on all shifts.

3. Claimant uses public transportation or walks to and from placé of employment.

4. Claimant's husband has a car, worked three to eleven shift.

5. Claimant has a language barrier and uses her fifteen year old son as an interpreter when seeking employment.

6. Unemployment Rules and Regulations were explained to claimant at interview with Connecticut State Employment Service, by Spanish Interpreter.

7. Claimant sought employment in the local labor market, submitted lists of names of prospective employers whom she had contacted.

8. Claimant was desperate for work, sought all types of work in the local labor market.

DECISION

To be eligible for benefits under the Unemployment Compensation Act, an individual must make a sincere and honest effort to obtain employment. Since the efforts of the claimant for the weeks ending July 15, 1972 and July 22, 1972 were negligible she was correctly declared ineligible for benefits. Since the efforts of the claimant during the four weeks following — weeks ending July 29, 1972 to August 18, 1972, had greatly improved, and as she had exposed herself to the labor market, she was incorrectly declared ineligible for this four week period.

The decision of the Administrator for the weeks ending July 15, 1972 and July 22, 1972 is affirmed. For the weeks ending July 29, 1972 to August 19, 1972 the decision of the Administrator in denying benefits is reversed.

TIMOTHY J. LOUGHLIN
Commissioner

The only appeal from this decision is to the Superior Court and such appeal must be taken within fourteen days from the date of this decision. Six copies of this appeal stating the grounds on which you assert this decision is incorrect must be filed in this office within the aforesaid fourteen days.

ATTACHMENT C

Case No. 3323-B-72

UNEMPLOYMENT COMMISSION
285 Golden Hill Street
Bridgeport, Connecticut

Juan Miranda
749 Hallet Street
Bridgeport, Connecticut
SS No. 581-64-7882

Local Office No. 2

vs.

The Administrator
Unemployment
Compensation Act

Mailing Date
October 24, 1972.

APPEARANCES: The claimant, together with Attorney John Creane, Esq. Counsel

The claimant filed a Total claim as of July 2, 1972. On September 11, 1972 the Administrator disapproved all claims from August 13, 1972. Claimant's appeal dated September 13, 1972, was heard in Bridgeport on October 17, 1972.

FINDING OF FACTS

1. Claimant is a married man, aged thirty-eight, with two children.

2. Claimant was last employed at the Felix Brass Company for a period of one year and his date of termination was June 29, 1972.

3. Claimant was disqualified by the Administrator on the issue of effort.

4. During the eight week period of time in question, the claimant has sought employment at least twenty-four places within the labor market.

DECISION

The Unemployment Compensation Law provides that to be available for work within the meaning of the unemployment

compensation statute, a claimant must be ready, able and willing to accept suitable employment and must expose himself unequivocally to the labor market.

The claimant, during the period of time in question, has demonstrated a sincere effort to seek employment within the meaning of the Unemployment Compensation Law and is eligible for benefits for the period of time in question.

The decision of the Administrator in denying benefits is reversed.

PETER J. IASSOGNA, *Commissioner*
Fourth District

The only appeal from this decision is to the Superior Court and such appeal must be taken within 14 days from the date of this decision. Six copies of this appeal stating the grounds on which you assert this decision is incorrect, must be filed in this office within the aforesaid fourteen days.

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

(Title Omitted in Printing)

ANSWER TO AMENDED COMPLAINT

No answer is made to the "Introduction" as no answer seems to be necessary.

1. The defendant denies that part of paragraph 1 which alleges or implies that this is a class suit. The rest of said paragraph is admitted.

2. Although paragraph 2 seems to be a prayer for relief, it is admitted solely to the extent that it alleges what the plaintiffs are seeking.

3. Paragraph 3 is denied.

4. As to paragraphs 4 through 9 inclusive, this defendant has no knowledge or information, and, therefore, leaves the plaintiffs to their proof.

5. So much of paragraph 10 as alleges that the defendant was sued in his individual capacity is denied. The rest of said paragraph is admitted.

6. Paragraph 11 is denied. (An initial determination of eligibility is made after a claim is determined to be valid.)

7. Paragraph 12 is admitted except for the implication that the statutes cited are the sole provisions relating to the initial determination of eligibility; said implication is denied.

8. Paragraph 13 is admitted except for the word "customarily" which is denied.

9. Paragraph 14 is admitted.

10. The first sentence of Paragraph 15 is admitted. As for the rest and remainder of said paragraph it is denied.

11. The date of November 16, 1971 cited in paragraph 16 is denied. The rest of said paragraph is admitted.

12. The date of January 3, 1972 cited in paragraph 17 is denied. The rest of said paragraph is admitted.

13. Paragraphs 18 and 19 are admitted.

14. As to paragraph 20, the defendant has no knowledge or information, and, therefore, leaves the plaintiffs to their proof.

15. Paragraph 21 is admitted.

16. As to paragraphs 22 through 24 inclusive, this defendant has no knowledge or information, and, therefore, leaves the plaintiffs to their proof. Paragraphs 5 and 7 of the plaintiff Triana's affidavit of September 12, 1972, cited in paragraph 24 of the Amended Complaint, are denied. As to the rest of the affidavit, the defendant has no knowledge or information, and, therefore, leaves the plaintiffs to their proof.

17. Paragraphs 25 and 26 are admitted. Any implication in paragraph 26 to the effect that the Commissioner's Decision was completely in Mrs. Triana's favor is denied.

18. The word "wrongfully" in paragraph 27 is denied. As to the rest of said paragraph, the defendant has no knowledge or information, and, therefore, leaves the plaintiffs to their proof.

19. Paragraph 28 is admitted.

20. As to the first sentence in Paragraph 29, the defendant has no knowledge or information, and, therefore, leaves the plaintiffs to their proof. The rest of said paragraph is denied, as is paragraphs 5, 10 and 11 of the plaintiff Miranda's affidavit of September 6, 1972 and paragraphs 3 and 4 of his affidavit of October 18, 1972. As to the rest and remainder of said paragraphs of the affidavits, the defendant has no knowledge or information, and, therefore, leaves the plaintiffs to their proof.

21. Paragraphs 30, 31 and 32 are admitted.

22. As to paragraph 33, the defendant has no knowledge or information, and, therefore, leaves the plaintiffs to their proof.

23. So much of paragraph 34 as states "without a prior due process hearing" is denied. The rest of said paragraph is admitted. Any implication in said paragraph to the effect that Section 31-241 Conn. Gen. Stats. is the only statutory basis for the defendant's decision to terminate, suspend, or withhold benefit payments is denied.

24. The word "allegedly" cited in paragraph 35 is denied. The rest of said paragraph is admitted. Any implication in said paragraph to the effect that the quoted provisions of Section 31-236 Conn. Gen. Stats. are the only statutory requirements pertinent to the denial of benefits to the plaintiffs Steinberg, Triana and Miranda is denied.

25. Paragraphs 36, through 41 inclusive are denied.

(Signature of Counsel and Certification Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

(Title Omitted in Printing)

STIPULATION TO FACTS

The undersigned parties stipulate and agree to the following facts for the purpose of aiding the court in deciding the above-captioned case on the merits.

1. Unemployment insurance benefits in Connecticut are paid entirely out of a trust fund maintained solely by contributions, interest and penalties paid by employers in Connecticut. If the Connecticut program is in compliance with provisions of Federal law, the Federal government pays the costs of administration. 42 U.S.C. Section 502, 503.

THE DEPARTMENT'S PROCEDURES FOR INITIAL DETERMINATION OF ELIGIBILITY

2. In order for a claimant to be found initially entitled to unemployment compensation benefits, he must meet the requirements of various sections of Chapter 567 of the Connecticut General Statutes. Connecticut General Statutes, Section 31-241 provides:

> *Initial determination:*
> The administrator, or deputy or representative designated by him and hereinafter referred to as an examiner, shall promptly examine the initiating claim and, on the basis of the facts found by him, shall determine whether or not such claim is valid and, if valid, the weekly amount of benefits payable and the maximum possible duration thereof.

A valid initiating claim is defined in Connecticut General Statutes, Sections 31-230 and 31-325(1)(3) as follows:

> *Section 31-230.*
> . . . As used in this section, an initiating claim shall be deemed valid if the claimant is unemployed and meets the requirements of sub-section (1) and (3) of section 31-235.

Section 31-235. Benefits Eligibility Conditions; Qualfications;

An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that: (1) he has made claim for benefits in accordance with the provisions of Section 31-240 and has registered for work at the Public Employment Bureau or other agency designated by the Administrator within such time limits, with such frequency and in such manner as the Administrator may prescribe, provided failure to comply with this condition may be excused by the administrator upon a showing of a good cause thereof; . . . (3) he has been paid wages by an employer who was subject to the provisions of this chapter during the base period of his current benefit year in an amount at least equal to thirty times his benefit rate for total unemployment, some part of which amount has been paid or was earned in at least two different calendar quarters of such base period.

3. In addition to the above provisions, a claimant may be disqualified for varying lengths of time at the initial stage under the disqualification provisions of Connecticut General Statutes, Section 31-236. The disqualifications include but are not limited to, (1) leaving suitable work voluntarily and without sufficient cause connected with work; (2) being discharged for willful misconduct; (3) leaving employment to attend a school, college, university as a regularly enrolled student; (4) receiving benefits in a prior benefit year and not again becoming employed and paid wages since the commencement of said prior benefit year in an amount equal to at least one-hundred fifty dollars ($150.00) and; (5) participating or supporting a strike which leads to unemployment.

4. When a claimant applies for unemployment compensation insurance benefits, he files a form entitled "New Claim for Unemployment Compensation" (Form U.C.-15) and is interviewed by an employee of the department. This interview is necessary to determine, in part, if the claim is a "valid initiating claim".

5. A check of the claimant's wage credits is then made by the department prior to an initial determination of eligibility.

The claimant is assigned a day of the week, based upon the claimant's social security number, to report to the Unemployment Compensation Office; when he does so the department, if it has found him to be eligible, then issues a "claim for first benefit payment" which is signed by the claimant and which authorizes the first payment of benefits to the claimant.

CONTINUED ELIGIBILITY PROCEDURE

6. Thereafter, claimants who have been initially determined eligible report bi-weekly to the local unemployment compensation office to file a "Continued Claim for Unemployment Compensation" (U.C.-46). On the back of this U.C.-46 form the claimant declares under oath that during the calendar weeks for which he is claiming benefits he has been able to work, available for work and made reasonable efforts to find work, was not engaged in self-employment; did not receive other states or federal unemployment benefits, and; did not attend school during the calendar weeks for which he is claiming benefits.

7. Prior to signing any statements that he had made reasonable efforts to obtain work and has been available for work, a claimant, if department policy has been followed in his case, has been supplied with a booklet entitled "Your Rights and Responsibilities Under The Connecticut Unemployment Law." In this booklet, the terms "available for work", and "reasonable efforts to find work" are defined on page 21 as follows:

> "AVAILABLE FOR WORK. You must be ready, willing and able to take any suitable job on a full-time basis.
>
> "REASONABLE EFFORTS TO FIND WORK". Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work.

8. Since June, 1972, claimants have been required to submit a "Continued Claim Work Effort Information Form", (Form U.C.-45) when filing their claim for bi-weekly benefits. This form is submitted in addition to the sworn statement on Form U.C.-46 concerning reasonable efforts to find work.

9. At each bi-weekly visit to the unemployment compensation office, the claimant presents completed forms U.C.-45 and U.C.-46 in the Claims Line to a department employee and is routinely given his benefit checks for the two-week period unless the department employee raises an issue of disqualification.

10. If a question of possible disqualification arises the claimant is not given his benefit checks but instead is referred to another line for a "seated interview".

11. After reaching the head of the "seated interview" line, the claimant is interviewed by a claims examiner. The claims examiner ascertains from the claimant facts as to possible disqualification. If the claims examiner determines that the claimant is eligible, the claimant is referred back to the Claims Line to pick up his checks. If however, the claims examiner determines that he has not met the statutory requirements, the claimant does not receive his benefit checks and is told that he will receive written notification of the department's decision concerning his eligibility for the weeks in question. This notice is a letter stating the reason for the non-payment citing a statutory provision therefor, and informing the claimant of his right to appeal. These letters are sent out under the signature of the office manager.

12. If a question arises during the "seated interview" which involves third party information, the department employee will make an attempt to contact the third party, generally an employer, while the claimant is present and will take into consideration the third party information in reaching a decision. However, if the third person cannot be reached at that time, the claims examiner will proceed to make a determination as to whether the person will receive benefits for the two-week period.

13. By an Interoffice Memorandum dated April 2, 1973, procedures were established whereby the Employment Service office employee who has stated, by memorandum, that a claimant has refused to accept a job referral, is required to be present when the claimant comes in for his interview. The claimant thus has the opportunity to confront this person and respond to his statements concerning the alleged refusal.

14. The most common reason for denying benefits to a claimant who has been initially determined eligible to receive benefits is an alleged failure to comply with the "reasonable effort" and "able and available" section of Connecticut General Statutes, Section 31-235(2). These reasons generally account for between 60 and 70 percent of the denial of benefits resulting from "seated interviews". Other common reasons for denial of benefits on a continuing eligibility claim include refusal of a suitable job offer and disqualifying or deductible income.

15. Eligibility is determined on week-to-week basis even though the claimant may visit the office only bi-weekly. When a claimant is denied benefits for one or both weeks in a two-week claims period, the Defendant's written policy is that the claimant will remain eligible for subsequent time periods so long as he satisfies eligibility requirements for those periods. In actual practice, however, some claimants who were found ineligible for one claims period and who filed appeals to the Unemployment Compensation Commission were denied benefits for later periods on the grounds that "they have appeals pending", in violation of the department's written policy.

PARTIES

16. Plaintiff Delia Triana filed a valid additional claim for unemployment compensation benefits on June 18, 1972 in Bridgeport, Connecticut, was determined eligible, and received weekly benefits through July 8, 1972.

17. On or about July 24, 1972, Mrs. Triana reported to the Bridgeport Unemployment Compensation office to file for and receive her benefit checks for the weeks ending July 15th, and July 22nd, 1972.

18. On that day, Mrs. Triana reported to the Claims Line to pick up her checks. After submitting her U.C.-45 and U.C.-46 forms, she was told by a department employee that there was a question as to her eligibility for the two-week period and that she should get in a different line for a "seated interview".

19. After waiting in the "seated interview" line, Mrs. Triana spoke with a department claims examiner who discussed

her efforts to obtain work during the two-week period ending July 22, 1972.

20. The claims examiner, determined that she had failed to comply with Connecticut General Statutes, Section 31-235(2) which requires making "reasonable efforts to obtain work" and she did not receive her checks for the weeks ending July 15th and July 22nd, 1972 at that time. At two subsequent bi-weekly appointments at the Bridgeport Unemployment office, Mrs. Triana was disqualified from receiving benefits for the four-week period between July 29, 1972 and August 18, 1972 on the grounds that she had failed to make "reasonable efforts to obtain work".

21. On or about July 27, 1972, written notice was sent by the Department to Mrs. Triana in a letter signed by Mrs. Smarz, the manager of the Bridgeport Unemployment Compensation office, informing her that she was disqualified indefinitely from July 9, 1972 because she failed to satisfy the "reasonable efforts to obtain work" section of Connecticut General Statutes, Section 31-235(2). On or about August 7, 1972, Mrs. Triana filed an appeal on the termination of her benefits. Because of a large backlog of pending appeals, totaling 6,100 state-wide as of August 31, 1972, her appeal was not heard by an Unemployment Commissioner until October 27, 1972.

22. On November 10, 1972, the Commissioner rendered his decision on Mrs. Triana's appeal. The Commissioner's findings as fact included the finding that Mrs. Triana "was desperate for work and sought all types of work in the local labor market". The Commissioner's decision was that Mrs. Triana was correctly denied benefits for the first two weeks in question and was incorrectly declared ineligible for the four weeks between July 29, 1972 and August 18, 1972, and that she was entitled to benefits for the latter period. She was paid accordingly and neither Mrs. Triana nor the Department of Labor appealed the Commissioner's decision to Superior Court.

23. Plaintiff Juan Miranda filed an initiating claim for unemployment benefits effective July 2, 1972 in Bridgeport, Connecticut, was determined eligible and received benefits through August 12, 1972. On or about August 30, 1972, Mr. Miranda reported to the Bridgeport Unemployment Compensation office to receive his benefit checks for the weeks ending August 19th and 26th, 1972.

24. On that day, Mr. Miranda went to the Claims Line to pick up his checks but after showing his U.C.-45 and U.C.-46 forms he was told by a department employee that there was a question as to his eligibility for the two-week period and that he should get in a different line for a "seated interview".

25. After waiting in the "seated interview" line, Mr. Miranda spoke with a department claims examiner who discussed Mr. Miranda's efforts to obtain work during the two-week period ending August 26, 1972.

26. The claims examiner determined that he had failed to make "reasonable efforts to obtain work" and therefore failed to satisfy the statutory requirement of Connecticut General Statutes, Section 31-235(2), and he did not receive his checks for the weeks ending August 19, and August 26, 1972 at that time.

27. On September 11, 1972, written notice was mailed from the Department, signed by Mrs. Smarz, the manager of the Bridgeport Unemployment Compensation office, that all claims from August 13, 1972 were disapproved and on September 13, 1972 Mr. Miranda filed an appeal to the Unemployment Commissioner.

28. Said appeal was heard before an Unemployment Commissioner on October 17, 1972.

29. On October 24, 1972, the Commissioner rendered his decision and held that during all periods in question, Mr. Miranda had "demonstrated a sincere effort to seek employment within the meaning of the Unemployment Compensation Act" and therefore was eligible for benefits withheld for the eight-week period from August 13, 1972 to the date of the appeal hearing. The Department of Labor did not appeal this decision and Mr. Miranda subsequently received the eight-weeks of benefits.

30. Plaintiff Larry Steinberg filed a valid initiating claim for unemployment compensation benefits in Willimantic, Con-

necticut on or about April 17, 1971. was declared eligible and received weekly benefits through October 9, 1971. On October 27, 1971, Mr. Steinberg reported to the Willimantic Unemployment Compensation office to file for and receive his benefit checks for the weeks ending October 16, and October 23, 1971.

31. On that day he reported to the Claims Line to file for his benefits but was informed by a department employee that he should stand in a different line for a "seated interview". After discussing his efforts to obtain work with a Department claims examiner, Mr. Steinberg was informed orally that he would not receive his unemployment benefit checks for the weeks ending October 16, and October 23, 1971 because he had failed to use "sufficient efforts to obtain work".

32. On or about November 1, 1971, Plaintiff Steinberg received written notice from the Willimantic Unemployment Compensation office that he was disqualified retroactive to October 10, 1971 for failure to be "available for work" and failure to make "reasonable efforts to obtain work" as required by Connecticut General Statutes, Section 31-235(2).

33. On November 5, 1971, Plaintiff Steinberg appealed the termination of his benefits to the Unemployment Compensation Commission. On January 13, 1972 a hearing was held before an Unemployment Commissioner and on May 10, 1972 the decision upholding the termination of benefits by the unemployment compensation office was issued by the Commissioner. The Commissioner's finding as fact included the findings that Mr. Steinberg" . . . was given not one but several hearings on his benefit eligibility status . . .", that he ". . . had every opportunity to present information favorable to his version of the facts in his situation . . .", and that "On August 24, he was again seated and interviewed by an examiner who told him he must expend (sic) the scope of his efforts to find work, which up to that time had been mainly to telephone or go to Locals 37 and 424 of the Iron Workers Union". Mr. Steinberg did not appeal the Commissioner's decison to the Superior Court.

34. Plaintiff Cecil Paskewitz filed an initiating claim for unemployment compensation benefits on August 16, 1971, in Enfield, Connecticut. On or about October 14, 1971 he was declared eligible for benefits retroactive to August, 1971 and received weekly benefits until February, 1972.

35. On February 16, 1972, Mr. Paskewitz's application for extended benefits pursuant to Connecticut General Statutes, Section 31-232, was approved by the Enfield Unemployment Compensation office.

36. On March 2, 1972, Mr. Paskewitz went to the Enfield Unemployment office to collect his checks for extended benefits and was told by a department employee that he was no longer eligible and would not receive extended benefits.

37. Mr. Paskewitz appealed this termination of benefits on March 2, 1972. A hearing was scheduled in August, 1972 but was postponed at the request of Mr. Paskewitz's attorney. The appeal was heard on October 11, 1972, but to date, the Unemployment Commissioner has not rendered a decision on the appeal.

38. The weekly unemployment benefits of each Plaintiff were terminated or withheld pursuant to Defendant's state-wide procedure authorized by Connecticut General Statutes, Section 31-241 which provides in pertinent part as follows:

> The administrator, or deputy or representative designated by him and hereinafter referred to as an examiner, shall promptly examine each claim for a benefit payment for a week of unemployment and, on the basis of facts found by him, shall determine whether or not the claimant is eligible to receive such benefit payment for such week . . . Such decision shall be final and benefits shall be paid or denied in accordance therewith unless the claimant . . . within seven (7) days after such notification was mailed to his last known address . . . files an appeal from such decision and applies for a hearing.

39. The State of Connecticut does not presently participate in the Aid To Families With Dependent Children-Unemployed Parent Program. (AFDC-UP).

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IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

(Title Omitted in Printing)

STIPULATION AS TO PLAINTIFFS' EXHIBITS

It is hereby stipulated by and between the parties that the Plaintiffs' exhibits Numbers 1 through 30 described in Plaintiffs' List of Exhibits, dated May 3, 1973, be admissible, saving any and all objections to relevancy.

It is further stipulated that xerographic copies of these exhibits may be submitted in place of the originals.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

(Title Omitted in Printing)

STIPULATION TO DEPOSITIONS

1. The undersigned parties stipulate and agree that the Deposition of Eleanor Smarz, (Plaintiffs' Exhibit 9.) February 8, 1973, and Timothy J. Loughlin (Plaintiffs' Exhibit 8.) February 8, 1973 reflect Department policy and are admissible as evidence in the above entitled case.

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Pl. Ex. 9

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA, and JUAN MIRANDA	)	CIVIL ACTION NO. 15,104
vs.	)	FEBRUARY 8, 1973
JACK A. FUSARI, Commissioner of Labor, The Administrator, The Unemployment Compensation Act, State of Connecticut	)	AT BRIDGEPORT

DEPOSITION OF ELEANOR H. SMARZ, MANAGER OF BRIDGEPORT UNEMPLOYMENT COMPENSATION OFFICE

APPEARANCES:

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Attorney for Defendant

[1]

.... Deposition of Eleanor H. Smarz, taken on behalf of the plaintiffs in the hereinbefore entitled action, pursuant to Rule 30 (a) and (b) (1) and Rule 30 (b) (4) of the Federal Rules of Civil Procedure. Plaintiffs' Motion For Leave To Take Depositions By Means Of A Tape Recorder was granted without objection January 15, 1973 by Judge Newman. The deposition was recorded simultaneously on two tape recorders and this verbatim transcript was typed by an employee of Bridgeport Legal Services, Inc., Margarita Torres, who was present at the taking of the deposition at the office of Bridgeport Legal Services, Inc 412 East Main Street, Bridgeport, Connecticut, commencing at 1:45 p.m. on Thursday, February 8, 1973.

OATH AND STIPULATIONS

MR. CREANE: The oath and deposition of Mrs. Smarz will be administered by agreement of the parties by Attorney Ira Horowitz, a Commissioner of the Superior Court.

MR. HOROWITZ: Raise your right hand: Do you swear that the statements you will give in this deposition are the truth, the whole truth and nothing but the truth, so help you God?

MRS. SMARZ: I do.

MR. CREANE: The customary stipulations, which I'll read into the record, have been agreed to by the parties.

[2]

STIPULATIONS

It is hereby stipulated and agreed by and among counsel for the respective parties that all formalities in connection with the taking of this deposition, including time, place, sufficiency of notice, and the authority of the officer before whom it is being taken may be and hereby are waived;

It is further stipulated and agreed that objections other than as to form are reserved to the time of trial;

It is further stipulated and agreed that the reading and signing of said deposition by the witness is hereby waived.

MR. CREANE: (directed to Mr. Wasik) The initial questions will be asked by Ray and then I'll have some questions and then, of course, you have the right to cross-examine when we're through.

DIRECT EXAMINATION BY MR. KELLY:

Q Mrs. Smarz, will you give us your full name and address, please?

A Miss Eleanor Helen Smarz, 120 Cliff Street, Shelton, Connecticut.

Q And would you tell us your job and the title that you hold?

A I'm the manager of the Unemployment Compensation Department in Bridgeport, Connecticut.

Q Would you please tell us how many people work for you,

[3]

at the Bridgeport Office?

A At present there are 33, plus some that are on loan from the Connecticut State Employment Service.

Q Of these 33 personnel that work in the Bridgeport Unemployment Compensation Office, how many of them are fact-finding examiners?

A To the best of my knowledge I think I have 9 at present. We've had some changes.

Q How many employment security aides do you have in the Bridgeport Office and by that I mean level, one, two and three?

A I don't, I'm not sure of the levels. I believe that there are four.

Q Of those...

A Wait a minute, I'm sorry, I could have brought these figures more accurately with me. We've had some changes that have taken place, that I'm...

Q Would you be able to supply those figures for us?

A I can very easily if you want them and then you will have them accurately.

Q Alright. Of the nine fact-finding examiners, or the nine people that you said conduct fact-finding examinations, are they all entitled-is their job description, fact-finding examiners, or do they have other job titles?

A At present they all are fact-finding examiners.

[4]

Q They're paid under that salary scale?

A Salary scale, yes.

Q Of the other 24 employees that work in the Bridgeport Office do any of them also conduct fact-finding examinations?

A On occasions.

Q Under what circumstances would they be required to do fact-finding examinations?

A If its, if we're under extreme pressure and we have a large number of fact-findings to do there is some selective interviewing that they can do.

Q During the past year were some of these personnel used as fact-finding examiners, over and above the nine that are designated fact-finding examiners?

A Yes

Q How many?

A I can't give you the exact figure, but I could obtain that for you at the office.

Q On a, well, for the purposes of an example. On a busy day, how many people would you switch over to become fact-finding examiners out of the rest of your staff?

A Well anywhere from say 2 to possibly 6 or more. I couldn't tell you that exactly depending on what the circumstances were and where they were needed at the time.

Q O.K. Would you explain for us now, how exactly a fact-finding determination is conducted?

[5]

A Now in what instance are you referring to?

Q Say a man comes in who is, or a woman, who is already been determined eligible and there's a question now as to their eligibility and this is a non-monetary determination. What is the procedure that is normally followed?

A If an issue arises, he is seated, he is asked to be seated for an interview and then he is called, in turn, by a fact-finder for an interview.

Q What would start in motion the determination that there had to be a fact-finding on the person?

A The interviewing that occurred on the claim line, is that what you are referring to?

Q Yes

A Possibly an issue of availability on the claim line may cause this.

Q O.K. Going back one step then. Does normally the question of eligibility arise when the person goes up to get his check?

A. Yes

Q What, does he have to present any form to show that he has complied with the unemployment compensation law?

A He presents an effort form.

Q And what is that form?

A That he has made effort to obtain employment in the

[6]

the past two weeks. These forms are issued to them each week when they file and they take it home with them, complete it at home, and return it with them on their next visit.

Q Is that the form that's known as UC-45?

A Yes.

Q And all claimants have to present their UC-45 form before they can get their checks?

A When they're filing their claim, yes.

Q There is, there. If the line or the number of claimants that day was very great, is the requirement of presenting the UC-45 form ever waived?

A No.

Q It is required in every case before the claim can be filed?

A Yes.

Q Now the person who first examines that UC-45 claim, what is their job title and position?

A It would be either an employment security aide or an employment security interviewer.

Q And if they find some non-compliance or some problem about availability for work, then the person is directed?

A To go to the fact-finding to have a seat.

Q And what occurs during the actual fact-finding procedure?

[7]

A The fact-finder will call them to the desk, review whatever the issue is and discuss the circumstances with them.

Q If the issue involves the failure to make a reasonable effort to find work, how will the fact-finder determine whether there has been compliance or not? What standards, or guidelines does he use?

A Well, each case has to be handled on its own merits. And they have to take into consideration the individual that they are interviewing. It's difficult to establish this without a specific case. Do you want to cite a case for me and perhaps I can--

Q If we could use a hypothetical case, where a man has filled out six places on his UC-45 form and there is some question in the employment security aide's mind whether or not these might have been the same places that he went to the week before, or whether she's seen these on his previous UC-45 forms, what would the fact-finding examiner look for to determine the validity of the search for employment by the claimant?

A Well they take into consideration the man's skills, the type of work he's seeking, his availability, the hours that he's available for work and his, the actual contacts that he's made to get the job. If it's a repeated effort, he would be asked, why. This is not always considered unreasonable. The man may be asked to return to this place at a specific time and

[8]

this is all taken into consideration a[illegible]'s on this basis that the benefits would be either approved or denied.

Q Would there be any checking by the fact-finding determiner to see if the person did go to where they said?

A There may be, yes. If they stated they filed applications and this occured at an interview and to determine whether or not it's valid, they may contact the employer to find out what actually occurred.

Q Would that be, would that contact occur while the claimant was there, being interviewed?

A Yes, if its possible for the interviewer to contact the employer at that time. Sometimes they can't reach the employer at that specific time or there may be extreme pressure and they can't reach the employer. They haven't the time to contact the employer so it would be delayed.

Q If a question of eligibility still arises and the employer is not able to have been contacted, will the man receive his benefits for that week if there's still a question in the fact-finder's mind?

A Oh, he may or may not depending on what the other circumstances there are involved, in a situation. I couldn't answer that with a direct yes or not. Let me say this, that in many instances, the claimant is given benefit of the doubt. But to say, you know, it's difficult to give you a direct yes or no answer in any of these instances because I don't know the exact circumstances of the case.

[9]

Q If a claimant came in with only three jobs that he had applied at, and a determination was made by the fact-finder that this was not sufficient effort to find work and the claimant said that he had a person who is not with him at the present time, who could verify that he had been to three other places, would the man be entitled to his check in that instance; or would his check be withheld until he produced the other evidence?

A In all probability it may be withheld until he produced the other evidence.

Q Would the man have to wait until the next two-week eligibility?

A Oh no. As soon as he produced the evidence.

Q He could bring, if he got the individual that afternoon or the next day?

A That's right. Now if he knew of the places that he had been and he has spoken to someone at these places, it wouldn't be necessary for him to bring the person, because if they could verify it they would. In some instances it will expedite it faster if they present the person if they can do it.

Q Are some claimants chosen for fact-finding interviews, on a random basis, being taken out of the claim line?

A On what basis do you mean that?

[10]

Q Is there a periodic redetermination by the Unemployment Compensation office of people in the benefit line, the ones that are waiting on line to get their checks?

A You mean do we pick specific ones out to interview at a time?

Q Yes. Are there any standards that are applied. Do you pick out every seventh individual?

A Oh, no.

Q Do you have any guidelines that require you to redetermine certain individual's eligibility?

A Not, oh it's difficult for me. I don't understand what you mean.

Q Would you redetermine, would you seek a redetermination on specific individuals every two months?

A Depending on what the circumstances are and their availability. Well let me cite an example. I may check on a woman's availability for employment, say if she had several children and there's a, and she may have babysitting problems, something to that effect, more often than I would on an individual who is laid-off for lack of work and was seeking continual work and there is definitely no problem on his availability for employment. Is that what you mean?

[11]

Q Yes.

A That's what you're referring to?

Q Yes. but also will there be a closer scrutiny of claims that have continued over a longer period of time?

A There might be, trying to determine as to why this individual is having more difficulty obtaining employment than someone else.

Q Are there any regulations, guidelines or standards that require a periodic redetermination of long-term claimants?

A Nothing definite, No.

Q No regulations that you could say, regulation B?

A There is an old DM memorandum that we had several years ago that we use to refer to, but that more or less is for periodic re-interviews. But that more or less has gone by the board. We use it occasionally as a sort of a general guideline.

Q Therefore, is it your statement that there is not any set standard of redetermination for claimants?

A Well during periods.. Policy will determine more or less how we will interview the claimants. We will receive a policy or an instruction from Hartford as to what we are going to do. It would be Hartford that would determine it to a certain extent.

[12]

Q Is there any policy in the Bridgeport Office that every tenth or twentieth claimant is eligible for, I mean, is required to be redetermined by the fact-finder?

A Every tenth or twenieth claimant?

Q This would be left up then to the discretion of the Employment Security Aide who reviewed the UC-45 form when the claim was presented?

A Each case is handled individually on its own individual merits.

Q And you testified earlier that all claimants have to have their UC-45 slips checked before they can receive their benefits?

A Yes they all present one when they're filing for benefits.

Q Mrs. Smarz, something I neglected at first. How long have you been the manager of the Bridgeport Office?

A I became manager, December 1, 1971.

Q How long have you worked for the Unemployment Compensation?

A I started in 1945. I worked until June, I believe,of 1946. I was terminated temporarily came back in 1947, went on active duty during the Korean conflict and returned after that and worked for the State ever since.

Q Have you always worked in the Bridgeport office?

A No.

[13]

Q What other offices have you worked?

A Well for a short period, I worked in the Ansonia office. That was for a very short period of time, way back in the 1940's. I managed the Norwalk office from, I believe, August of 1962 until May, I think, or June of 1970. Then I became manager of the Stamford office, then transferred to Bridgeport. I'm not sure of the exact dates but that's about the length of time.

Q So your managerial experience has been both in Bridgeport and in Stamford?

A And in Norwalk.

Q And in Norwalk. Did you hold other positions below that of manager when you worked in the other offices and even in the Bridgeport office?

A Well in the other office for the short stay. Oh, well I was also in New Haven. I was a claim-examiner at that time. I was a super-claims examiner, a fact-finder and a supervisor while in the Bridgeport office.

Q You testified earlier that some times personnel of the department other than fact-finders will be called upon to do fact-finding examinations or determinations when there is a need. Do you ever do fact-finding determinations?

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A At present?

Q Yes.

A Once in a great while.

Q Do you review the fact finding determinations made by your fact-finders?

A My supervisor usually reviews all the cases that go on appeal or any case that one of the fact-finders will request and on occasions I will review also.

Q You said your supervisor. Is there another manager?

A I have an assistant manager in the Bridgeport office who is in charge of the fact-finding.

Q But he is under your authority?

A Yes.

Q So he would be the one. Does he review all fact-finding determinations?

A Not all fact-finding determination, no.

Q Is there any criteria by which a fact-finding determination is review by a supervisor?

A No there isn't. On occasions when a situation will arise where we will do a review of certain instances or certain issues in your fact-finders records. Cases are reviewed to see that they would understand policy. And if there is any questionable case or a case that is going on appeal or dispute, if we have some issue involved, it would be reviewed. If we have any problems that occur in the office we'll forward a report to the

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adjudication unit in Hartford for a decision.

Q Does your fact-finding supervisor ever overturn decisions by the fact-finder?

A Yes

Q Is there any criteria or standard for that?

A Well, I think the main issue would be that there was some misunderstanding on the policy and he felt that the examiner was making the wrong decision.

Q Supposing the converse that there was a claim found, a claimant found eligible. Are there ever times when the claimants, when a fact-finder determination would be overturned by the supervisor, on a finding of eligibility?

A You mean to make him ineligible?

Q Yes

A There may be an instance.

Q But it, it was your testimony previous that it's not normally the procedure to review all fact-finding determinations?

A It's impossible.

Q Do you have any bi-lingual fact-finders in the Bridgeport office?

A No. Do you mean that would speak other than English?

Q Specifically, Spanish-speaking fact-finders?

A I have one young man that's attending school now studying Spanish. I don't know if the others have are able to

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speak other languages besides English and understand it.

Q Is there any provision made that if a fact-finding determination is required in a case for a person who does not speak English, that a translater will be provided by the Department?

A For Spanish-speaking people I have two employment security aides that speak and understand Spanish, and they've been used for translating.

Q However, they do not do the fact-finding themselves?

A They do not do the fact-finding. They come into the back field and they will translate, both to the claimant and to the fact-finder. I have one or two people, I believe, that can speak some Italian. When the issue arises they can help. I myself can speak Ukranian. Well, not that fluently, I take it back. And some Polish, but enough to understand the individual or so that they can bring someone with them on their next visit to help them in interpreting. It has always been my policy, the policy of the Department, to try to assist these people when they come into the office. Unfortunately, we cannot provide enough interpreters for them, but we do try to make arrangements for them if at all possible to bring someone with them. Sometimes there is a claimant that's available and is filing for benefits too. They will assist you. People are very cooperative in that manner, in trying to help one another and we try to help them.

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Q Mrs. Smarz would you please explain what is the practice and procedure followed in employing a pre-termination hearing by the office. What sets it in motion and what exactly is it?

A A predetermination hearing is done in reference to a separation of employment, is that what you're referring to?

Q Yes, excuse me. The redetermination hearing we're talking.. The pre-termination hearing, not re-determination, unless our terms are somewhat different. In a pre-termination hearing, after a person has been found initially eligible, what exactly is the practice or procedure that is followed, and when did this type of hearing start?

A Are you referring now to separation, to refusals of referral by the Employment Service?

Q Yes.

A That type of hearing?

Q Yes, and what other circumstances would necessitate a pre-termination hearing?

A Well there are, if a claimant reports to the office and files a claim and is separated from employment for other than lack of work and it's determined by the reason for separation, that a hearing must be scheduled for the employers involved.

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He is at that time notified and we have what we call a pre-determination hearing form, which is mailed to the employer with a supplementary fact-finding report and a slip is given to the individual, scheduling him for a hearing and a time that he will report and the separation from employment be discussed at that time.

Q Do pre-determination hearings ever occur after a person has been found eligible for benefits and has begun to receive checks?

A If there, now let me see if there is an instance. I'm trying to think. Now if a claimant refuses a referral by the Employment Service, and it is determined that a hearing is necessary, at that time there is a hearing scheduled. A Route Slip is received from the Employment Service, and we send to the individual a hearing notice scheduling a hearing for him to come in and the hearing notice explains what the situation is. That there is a hearing scheduled for him and he reports at that time and we have a hearing regarding the separation or the refusal of referral, I'm sorry.

Q O.K. Dealing with a specific issue of refusal to a certain referral. Until such time as a pre-determination hearing is rendered, is the man or woman still entitled to collect benefits?

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A Yes, I believe so. The, he is receiving his benefits. We are notified by the Employment Service that he has refused a referral and we immediately notify him to report for a hearing by a five-day period.

Q What form does this pre-determination hearing take, is it the same as a fact-finding?

A Yes, it's a fact-finding. It's a fact-finding interview.

Q Is there the necessity to check third-party information, not present when the hearing is going on?

A Well there may be if the individual disputes the fact that he did report on this specific referral. And then if the employer contact is made and it's determined that the individual was there and some error, we were notified that he failed to report, that would be your third party. If he was there and the job wasn't suitable for him then perhaps the claim for benefits are paid. But, that would be your third party. Sometimes there may be a question arising where they have to contact the Employment Service interviewer that made the route slip.

Q If there is a conflict between the statement of the claimant and the statement of the party that the claimant was referred to, how does the person who hears the pre-determination hearing, how do they render a judgment?

[20]

A Only on the facts that they have before them, to determine whether they can approve or deny.

Q But if for example, a man claims that he went to the place, the job that he was referred to, and that they told him that no jobs were available, later on a call comes in from that employment, that possible place of employment, stating that the man was never there. After an initial check, the man claims that he went there but they didn't take his name down and they possibly forgot him. Is there any standard or guideline?

A Yes. Very often an individual, if he has been to this place can describe some conversation or some individual that he saw there and he's given benefit of the doubt on the basis that he was there.

Q How long have these pre-determination hearing been in effect?

A I don't remember exactly when we started using them.

Q Is it, are they fairly recent? Within the last two years?

A For separations, I believe they've been, well since. Do you know, Mr. Wasik? I'm sorry. I have to direct it to him. Was it about June of 1970 that we went in for pre-determination hearings on separations and then at a later date on the refusals of a route slip from the Employment Service? The exact date I can't tell you. I would almost say, I'm trying to think now.

[21]

Q This isn't a long-standing practice that's been in effect for, like ten or fifteen years?

A No, definitely not. No this all stems from Java.

Q Alright. o.k. Thats..

A That's what you want?

Q What employees are eligible to handle pre-determination hearings?

A I don't understand.

Q Are there situations, as with the fact-finding, where the employment security aide would be able to do a pre-determination hearing?

A An employment security aide?

Q Yes.

A There may be an instance where they may do it, but its doubtful.

Q In other words, normally an employment security aide, either of level one or two, would probably not do a pre-determination hearing?

A That's right.

Q Normally then would it be the practice that only an employment security aide number three, one with experience, might be called upon to do a pre-determination hearing?

[22]

A No, its.

Q Is it rather unlikely?

A It's unlikely, unless there is an extreme emergency. But it's unlikely.

Q Is the level of expertise and knowledge required for a pre-determination hearing, higher than for a fact-finding determination?

A Well, they have to be. I would say so.

Q That there is the necessity of a higher expertise for that type of pre-determination hearing?

A Yes.

Q Mrs. Smarz, is the manual that entitled Unemployment Compensation Regulations used by the personnel in your office? I'm referring to that yellow paperback pamphlet that was..

A Yes.

Q That is used. Is that available to all fact-finders and redetermination, people who handle redetermination hearings, pre-determination hearings?

A Under the UC law they are available.

Q Does each fact-finder also have a copy of the Interpretive Digest on court decisions?

A I have a master copy in the office that's accessible to everyone.

Q So there's only one copy in the office?

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A I have one copy.

Q Do you all, does your office also have a copy of the claims policy letters?

A Yes, fact-finders have copies also.

Q The fact-finders each have individual copies?

A Yes, I believe they all have copies. We try to obtain one for everyone.

Q And the two booklets that have both the unemployment compensation laws, and the one, the yellow one, with the regulations are also contained by, are also kept by the fact-finding?

A They should each have one. I would say that.

DIRECT EXAMINATION BY MR. CREANE

Q Mrs. Smarz, you indicated that when you have a heavy backlog of fact-finding decisions to make that you're forced to use persons in the office other fact-finders. Would those be employment security aides, more experienced ones?

A Do you mean employment security aides or do you mean employment security interviewers?

Q Well, what is the distinction?

A An employment security interviewer is the title of. The employment security aides are a group of people that were

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appointed I believe, within the past two or three years and they're GS D 1, 2, and 3. Now employment security interviewers were formally known as claims examiners and their titles were changed to employment security interviewers. Now there were also what we had, intermittent claims examiners which were our part-time people.

Q Alright, well suppose you, I'll just let you answer the question. Which of those persons, from which of those groups, would do, be pressed into fact-finding service if there was a large backlog?

A Employment interviewers, some of the intermittents.

Q Would be intermittens claims?

A Claims interviewers, with experience; good experienced the claims examining and possibly even an employment security aide, if necessary. But I can't recall ever needing to use them, although I have asked them if they were interested, they can do it.

Q When a person who has been initially determined eligible and is receiving benefits goes into the office on a regularly scheduled bi-weekly appointment, when they go, who do they show their UC-45 form to? Is it a claims' interviewer, or an employment security aide?

[25]

A Either one who is operating that particular claim line.

Q So they, their work is interchangable at that point?

A Yes.

Q Is it possible for a person to collect 26 weeks of benefits which is the maximum under law right now. Is it possible for him to receive 26 consecutive weeks without a redetermination being made as to his eligibility, so long as at none of his appointments was any question raised by an employment security aide or the claims interviewer that would require him being referred for a fact-finding?

A Yes.

Q So there's no procedure for periodic redeterminations of individuals who are collecting benefits?

A No.

Q Did every person who applied at the Bridgeport unemployment office during June, July and August of 1972 receive a benefit rights interview?

A No, I couldn't say they did. Not every person, no I wouldn't say that.

Q In fact, wasn't there a memorandum sent to the office managers in October, indicating that, now that the rush was over, or the heaviest load of work during the summer, that it was expected that everyone would now receive a benefit rights interview? I'm referring, I can show you the memorandum. It says, "Memorandum To All UC Staff Members And Local Office Managers"

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dated October 5, 1972, signed by Mr. Hatcher. Do you recall receiving that memorandum?

A I probably have it in my file.

Q So apparently when there is a heavy influx of new claimants or very large list of continuing claimants, it's not always assured that a person will get what you term the benefit rights interview?

A That's right. It's impossible. We're not staffed sufficiently to be able to handle all of that, to do it all.

Q How many employees approximately did you say, are employed there now?

A I have, I think its 33 or 34, I'm trying to determine because we lost one or two.

Q Do you recall approximately how many employees there were six months ago, and a year ago? Whether there were more or less?

A Oh there were more. And I think we had a staff of anywhere from 40 to 44, intermittents included in that group.

Q Do you have any intermittents examiners now?

A No intermittents working now.

Q They've all been laid-off?

A Yes.

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Q You indicated that either a pre-termination or pre-determination hearing, in any event, a fact-finding hearing is given when there is an issue of a person refusing a referral by the Employment Security Division?

A Yes.

Q Are there any other type of circumstances where this type of hearing would be given before the person's benefits were terminated?

A Well is they are seated for an interview and there is some question that's going to arise we ask them if they want to have the interview then or if they want to, would like to have a hearing scheduled. We give them that option.

Q But if they choose to have a later hearing, they would not get...

A They would schedule another hearing for them.

Q They would not get their benefits in the meantime, I'm sorry, I didn't hear the answer?

A No.

Q When a hearing is given involving a referral or refusal of a referral by the Employment Division, that would involve a question of whether the applicant or the claimant had in fact refused it, whether it had in fact been offered, whether in fact he had a valid reason for refusing it if indeed he did refuse it. Are any

of these issues ever involved on a, when a fact-finding decision is made that a person had not used reasonable efforts to find work, would any of these factual issues ever be present in that type of cases?

A I don't understand what you mean. Our issue at hand is the fact that he refused a referral.

Q Right. In that case, he is generally given notice and an opportunity to have a hearing and to present evidence if he chooses to before the decision is made?

A Yes.

Q On the reasonable effort fact-finding decisions, those are generally conducted the day that the person comes in to pick up their check. Isn't it true that in some of those cases, there will be factual issues involved, such as whether or not the man had in fact gone to several places that he had listed on the UC-45 form?

A Yes.

Q In those cases you indicated that the fact-finder would try to confirm whether in fact he had gone to the places he listed or stated that he went to, but it wasn't always possible to reach the employer. Isn't that correct?

A Yes.

Q And that the fact-finder would make his decision based on facts that he could confirm on the spot. What I am asking you

is whether or not you see any significant difference between factual issues that might be involved in the reasonable effort decision, as opposed to factual issues that might be involved in a refusal of referral by the employment service. In other words why are hearings given before the person is terminated on refusal of referral by Employment Service but not on reasonable effort issues?

A I can only say it's been procedure.

Q On the issue of the reasonable effort to obtain work, which Mr. Kelly went into, some of it, when he was questioning you earlier, I'd like to go into that in some more detail. To your knowledge is the statutory requirement of reasonable effort specifically defined in any department written regulation or policy letter?

A No, not. You mean like a number, so many contacts is considered reasonable effort or what have you. No, not to my knowledge. It's,each effort case is handled by its own individual merits.

Q You indicated that,what I'd like to ask you, you talk to your fact-finders, do you not, when you are training them before they begin their duties?

A Yes.

[30]

Q And I assume you would have periodic meetings to go over new regulations or policy letters you might get. You also indicated that occasionally you give, or sometimes you give the benefit of the doubt to the claimant when there is a question of whether he had made reasonable efforts. Is there any single standard that is used by the fact-finding examiners on deciding one way or the other, on whether the person gets their benefits?

A You mean on giving them benefit of the doubt?

Q Are they told that they are to apply a specific standard, such as the person gets benefits if they have a reasonable doubt that the person had not made sufficient efforts? Is there any type of standard, a single, uniform standard that they are asked to apply, when they have a doubt in their mind?

A It all depends on why there is any doubt in their mind as to whether they had made a reasonable effort. No, there's, I'm sorry I don't understand you. If its handled on its own individual merits and there is some doubt as to why, as to whether or not this individual should be paid, then the doubt would either stem from the fact that the individual doesn't understand the circumstances or there is some reason why he hasn't looked for work, which may create an issue of availability. Or there may be an issue that possibly he had a job pending and it didn't materialize for him and if this could be verified, he'd be given benefit of the doubt and paid benefits. It's so general.

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It's difficult because everything is handled on,each case varies.

Q That's true. And isn't it true that, at least in some cases, the identical set of facts presented to the nine different fact-finders who are employed right now, that there might very well, on questionable cases, there might very well be a different decision reached by different fact-finders?

A There might be.

Q Are you familiar, Mrs. Smarz, with a policy letter, which I'll show you in a moment, I believe the date of it is 1956, relating to the statutory requirement of reasonable efforts to obtain work. I'll show it to you and ask you if you are familiar with it?

A I'm familiar with it. Every so often I take them and re-read them and review them.

Q For the record I'm referring to a "Disputed Claims Policy Letter", with the identifying number SNU,A60H directed to all unemployment compensation managers signed by George Walker, Director. The date of the policy letter is October 22, 1956 and the policy letter attempts, does it not, to define what constitutes reasonable effort?

A That's it's not a hard and fast rule, yes.

Q Now this policy letter indicates a number of variables or factors that might influence whether or not the person had made reasonable effort and I'd like to go into that a little bit,

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not just what's in the letter but what actually comes up in your office as cases come in. Would one factor that would be taken into account by the fact-finding examiner to determine whether or not reasonable effort had been made, be whether or not the person had a car?

A It might be, yes.

Q Would a person who had a car be expected to go to more places than a person who did not have a car? To conduct a more far-ranging search for work?

A Perhaps a more far-ranging one.

Q Would a person who had access two days a week to the use of a car of a friend or of a relative be held to a higher standard on working than a person who did not have a car at all?

A Well there would probably be other factors that would enter into that also.

Q But that could be one of the factors that would have to be weighed by the fact-finding examiner?

A Maybe. Yes.

Q I'm sorry, are you saying that he should, but might not? Or that maybe he would and maybe he wouldn't?

A That would be one of the factors but then, in addition to that there would be other factors that would determine the decision also.

Q What type of weight?

[33]

A The type of work that the individual does would enter into that.

Q What was the employment situation in Bridgeport during June, July and August of this summer? Would you describe it as, many jobs available, or fewer than usual, or a very tight labor market with few jobs available?

A There were some jobs that were available.

Q But would you describe it as a fairly, as a tight labor market? Do you know what the unemployment rate was in Bridgeport during June, July and August?

A I would say that, oh, I'd have to check the statistical figures.

Q But did you, was that information passed on to the fact-finding examiners during each month? Are they informed of what the unemployment rate is?

A No.

Q They're not?

A Not the percentage figure, no.

Q In the policy claims letter referred to earlier dated October 22, 1956, it states that it is not intended to require claimants to make futile trips to employers' hiring halls just for the sake of building up a record of job seeking when there are not many jobs available. Do your fact-finders take into account the job market when they're making a determination as to reasonable effort?

[34]

A To a certain extent.

Q But they are not given the information on a regular basis of what the economic indicators show for availability of jobs?

A Well they may have a general idea, in discussion, but I don't actually give them the information on a percentage basis, the actual statistics.

Q So that you're not sure to what extent they take that into account on their fact-finding decisions?

A (unintelligible)

Q Have you ever seen it described as one of the factors that influenced the decision of a fact-finder when he writes his fact-finding report, as being the basis for his decision, or one of the factors?

A Not that I remember.

Q Mr. Blair is employed in your office, is he not?

A Yes.

Q What is his..

A Fact-finder.

Q He described the fact-finding function on reasonable effort to obtain work, in a hearing which is an exhibit in this case, as being basically a matter of judgment on the part of the fact-finding examiner when he's making decisions on reasonable efforts. Would you concur with that description?

[35]

A What was his description?

Q That in the end it comes down to good judgment, on whether they employ good judgment or not,on making a determination as to whether the person has used reasonable effort.

A Welf the whole intent of reasonable effort is that the individual is making efforts to obtain, making efforts, so that he may obtain employment from these efforts in the future. And this is all taken into consideration. Now it would be on the judgment of the interviewer as to whether or not this is actual reasonable effort.

Q From your experience what would you say would be the average, if there is an average length of time for a fact-finding interview on the issue of reasonable effort to obtain, to work? Would it be 5 minutes, 10 minutes, 15 minutes?

A Well they vary. 15 minutes to a half-hour, sometimes 10 minutes.

Q Do you keep figures on the number of fact-finding interviews that are conducted in your office on a daily, weekly, or monthly basis?

A Yes.

Q Do you know how many were conducted during the peak period of claims during this summer? For example, do you know approximately how many were conducteu during June, July or August?

[36]

A No. I could get those figures.

Q Would you make a note?

A You want them?

Q Yes. You keep them on monthly basis?

A Yes, Hartford. Statistics would have that in Hartford.

MR. WASIK: You're talking about the interviews?

THE DEPONENT: Yes, they want the number of interviews, the fact-finding interviews held during June, July and August, of 1972.

MR. CREANE: Not all of them, really. We're interested in the one that involves fact-finding interviews other than initial eligibility. We don't want the fact-finding interviews or predetermination hearing on separation issues.

THE DEPONENT: I think they have a breakdown on that. I would have to check that.

BY MR. CREANE:

Q. Do you know how many claims, initial and continuing claims, were filed in your office last week or the week before that, just approximately?

[37]

A Between 5,000 to 7,000.

Q That would be both new claims and continued?

A And continued. The figures varies, that's why I can't give you a definite figure. Those are all obtainable.

Q There's a definition by the Department of reasonable effort to obtain work, a statutory requirement for eligibility, contained in this 1956 Policy Letter. I'll read it to you and ask you if that is generally the standard that you try to apply and to have your fact-finding examiners apply. In paragraph two it states, "reasonable efforts to obtain work are such effort as we would ordinarily expect anyone to make who is honestly looking for work".

A Yes.

Q That is a very difficult standard to apply, isn't it Mrs. Smarz, in all honesty?

A Is it difficult?

Q Yes.

A Yes, it is difficult. That's why I try to say that it has to be handled on each individual case.

Q In order to handle it on an individual case, to make a fair determination on an individual case, the fact-finding examiner would have to know quite a bit about the claimant, would

he not. He'd have to know the man's background, the size of his family, his past work record, how badly he needs employment, what type of man he is, his physchological makeup, he would have to know quite a bit, wouldn't he, to make an individual determination? What is reasonable for that man might not be reasonable for another man, isn't that right?

A Well it's impossible to know all that about an individual as far as that's concerned, but the type of work that he's seeking and something about his background in that particular work and where it's available and what efforts he has made to get that type of work would be my main concern.

Q There is in fact, no written list of all of the factors which might influence a decision on whether a reasonable effort to find work has been made, isn't that correct?

A Not to my knowledge.

Q And in fact, such an exhaustive list would probably not be possible, would it, since there are so many factors which might influence a particular determination by a fact-finding examiner?

A That's true.

Q To your knowledge, what written standards, relating to reasonable efforts to obtain work, what written standards or policy letters are available to the fact-finding examiners in your office other than this policy letter dated 1956?

To give them guidance in making their decisions?

A Why I'd have to check all my Policy Letters to determine it, because I have a breakout on it. There's a recent memorandum that came out over the signature of Carl Eiseman.

Q I can show you some recent Policy Letters and you can tell me if there are any others, to your knowledge. I'll give you a moment to look them over. Is there a requirement, written or unwritten at the Bridgeport unemployment office that persons, when they fill out their UC-45 form, if they list all of the places that they visited all in one day for that two week period, that that would not be reasonable effort? In other words a person went to all in one day, the six places or seven places?

A What I would be concerned about in that instance, and what we would question, is what about the other nine working days in the week, in the two-week period, and why didn't they make efforts during that period, because it might create an issue of availability.

Q Were claimants told that they had to have at least six employers sign the card in order to be eligible?

A The employer isn't required to sign the card.

Q To list six places of employment that they've visited, were they told that they had to?

[40]

A It was not an official notification that they were to tell these people, if that is what happened. But this is, there's no official number or anything in reference to this.

Q Suppose a person, person A, went to six places and listed them on his UC-45 form and made no other efforts to obtain work; person B went to 5 places, or four places, but also made other efforts, they looked in the newspaper, they called friends, they made a number of other efforts to obtain work. How would a fact-finder arrive at a decision as to whether either or both of those were eligible for benefits?

A We would just arrive at the reasonableness of the situation in both cases.

Q The reasonableness being what the fact-finder feels is reasonable?

A That's right. In the particular instance. You're talking about a man that lists four places and then he ask friends. Say that this man is..

Q And he reads the newspaper everyday.

A And he reads the newspaper everyday and he has certain qualifying skills and he knows that there may be a job open in a plant and perhaps with asking friends he may get this position. That's reasonable. Isn't that what you or I would do to obtain a position.

[41]

Q But isn't it also quite likely that the person who had listed six places on their UC-45 form would have gotten his check with no problem at all, as long as it was filled in properly. The employment security aide or the claims interviewer in all likelihood would have, if the form was filled out properly have given him his check if no other question arose?

A It's possible.

Q Whereas the person who had perhaps only filled in four places might very well have been referred for a fact-finding interview since he had not filled out the forms completely?

A It's possible. But on the basis after being interviewed he was not denied benefits.

Q Well, it is a hypothetical that I'm giving you.

A You know this could happen. Well yes, I know, I understand that, but this does happen.

Q Is it possible that, of your nine fact-finding examiners, we'll say, seven would feel that the effort was reasonable, looking, reading the newspaper, and asking friends and that one or two of the examiners might say, "Well, how do I know that he really did that? He didn't fill out the form and I find that he did not use reasonable effort". Isn't that possible?

A It's possible, but I sure would question it.

Q But in all likelihood?

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MR. TAMIS: John, can I ask a question?

MR. CREANE: O.K.

MR. TAMIS: Just a quick question.

DIRECT EXAMINATION BY MR. TAMIS:

Q Is it the understanding of claimants in order to collect checks on a bi-weekly visit that they have to present the UC-45 form with at least six employers on it?

MR. WASIK: She can't testify what the understanding of a particular claimant is.

MR. TAMIS: Well that's a good point. I'll rephrase the question.

BY MR. TAMIS:

Q Is it the policy of the claims examiners on the benefit line to give checks when the UC-45 form has six employers listed on it spread across the ten working days that are in issue?

A Yes, they probably will.

Q Alright, so we're starting from that supposition.

BY MR. CREANE:

Q On the other hand, it's not automatic proof that you've satisfied the reasonable effort simply because it's filled out. It does not automatically mean that you have to get your checks, does it? You indicated that there's no written policy on

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the number of employers that would be, that could be required that the person visit in order to get their checks?

A No, there's no written policy on the number of employers.

Q So in fact one claims examiner, I mean fact-finding examiner, might feel that six places, spread evenly over two-week is a reasonable effort. Another fact-finding examiner might feel that eight is a reasonable effort, or ten is a reasonable effort, isn't that correct?

A Well I can't tell you what the fact-finding, how the fact-finding examiner feels because I don't know all the circumstances for this specific case that you're referring to. There's more involved in these situations other than just the fact that this man went out to look for a job. Or that he had listed six or ten or twelve places to seek employment because there's many other factors that are taken into consideration also.

Q And the list of other factors that can be taken into consideration is listed nowhere in writing, isn't it correct?

A No I wouldn't say that. You have it in some of your letters right there.

Q That indicates that at most, three factors will be taken into account: the age of the person who is called the claimant; the type of work that he had done previously, relating

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to the wages of the jobs that are available; and I believe, a third factor discussed in many of the memorandums that I've seen from the department are that senior citizens will be given special consideration, persons over 66 will not be required to make a strenuous a work search because many places simply don't hire anyone over 66 and they're not required to, isn't that correct?

A Just as the memorandum reads.

Q Yes, and would you indicate the other two factors which are discussed in the memorandum?

A What are you referring to? Efforts to get emoloyment?

Q Yes, well you indicated in response to an earlier question which was that there was an inexhaustable list of factors which could influence the fact-finding examiner when he made a determination as to whether a reasonable effort has been made. You seem to contradict an earlier statement when you indicated that, in fact, the factors were spelled out in the memorandums and my point is that there are only three factors discussed in the memorandum that you referred to.

A Alright, you have your age. You have your skills, the type of work. You have your memorandum on effort here in your reasonableness. That's what I was referring to.

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Q Well the reasonableness definition, wouldn't you agree simply is: reasonable is what the fact-finding examiner determines to be reasonable under the circumstances?

A Under the circumstances.

Q So that there are many other factors which can influence whether or not the effort is found to be reasonable?

A Yes.

Q For example, you indicated that a person who went back to a place that they had applied to at an earlier point, it might or might not be unreasonable for them to do that, to re-apply at factories that they had been to at an earlier date?

A If an employer indicated that there may be employment if he returned there again in two weeks, that he may have a job for him, it would be reasonable for him to return there.

Q Would the size of the factory that the person went back to be a factor? In other words, if a person went back periodically to a very large factory which was known to hire periodically, that might be treated differently by the fact-finding examiner than revisiting a very small factory with a very low turnover of employees?

A It might be.

Q And that there are no, that you really rely on the good judgment and good sense of your fact-finding examiners to

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treat people fairly who come into the office and to make fair decisions on fact-finding decisions?

A Yes.

MR. CREANE: Don, I have no further questions at this time. Do you have any questions?

MR. WASIK: Just a couple, maybe.

CROSS-EXAMINATION BY MR. WASIK:

Q During normal times, if there is such an animal, Mrs. Smarz, is it a policy of the department to have periodic interviews when people come in on interviews?

A Yes, in normal times.

Q Yes, alright. So that, is it correct to say that during the past year at least, with the unemployment situation the way it's been, that these periodic interviews have not been held, but that the interviews are only held when the interviewer on the line feels that there is an issue as to a person's eligibility?

A That's right.

Q As to the question of benefit rights interviews, will a Spanish-speaking person or anyone who has difficulty with the English language files a claim, is there any special effort or policy in regard to giving these people benefit rights interviews?

A As I spoke of the two young ladies that I have that speak Spanish in the office and if there is an issue arises where

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its definite that the individual does not understand what is trying to be explained to him, we do ask the interpreter to come and speak for them. As far as another individual is concerned, or other languages if it's at all possible and there's someone available that can help them, a claimant perhaps, we would use that individual or we would ask them to bring someone to help them.

Q But is it, is the person who acts as an interpreter whether its a department employee or a friend brought by the claimant, is it, are the rights explained to the individual?

A If we're giving a benefit rights interview, yes. It would be explained to the interpreter to explain it to the individual.

Q But is it a policy to give such a benefit rights interview to such a person having difficult understanding the English language?

A We try to give it to everyone we interview. Is that what you mean?

Q Yes. I understood your earlier testimony that there was, at least some period when not everyone received a benefit rights interview?

A During the crush period. They asked during June, July, wasn't that your question. At the time, did everyone get a benefit right interview? They couldn't.

[45]

Q How about the people who had difficulty with the English language. Were they given a benefit rights interview?

A And there was a question of eligibility or availability, we tried to give them to them, yes.

Q In other words, if a person came in with a UC-45 properly filled out, even though that person might not fully understand English, if there was no question in the interviewer's mind, that person would be paid?

A Right.

Q Even though that person might not have been given a full benefit rights interview?

A That's right.

Q But if an issue of eligibility arose would that person be given such an interview?

A We would try to explain the eligibility requirements to them, yes.

Q Now I thought I understood you to say that when a person is given an option of having a hearing that day or come back a week later, that if he decided to come back at a later time, that he would not be given his check, at that time. Is that correct?

A I'm trying to think. They are to be paid their benefits at that time. We have very few of these instances, that's

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why it makes it so difficult. They usually will have the hearing while they're there. If someone has created the problem in the past of not having the hearing or is collecting or is electing to have the hearing at a future date, then we pay them their benefits. Then they have the hearing later.

Q So they are paid?

A I know what you're talking about. You're referring to the question that arose there. They would be paid their checks. I have so few of them that actually occur.

MR. CREANE: I think we might have, there might be a misunderstanding here. I just want to make sure that we're talking about the same situation. When you talked about a person being paid, pending a hearing, you're talking about a refusal of a referral, that type of an issue, are you not? A refusal of the job offered by the Employment Service?

THE DEPONENT: Yes. They would be paid their benefits, right. And then if an issue occured where we are going to deny the benefits when it would have be, constitute an overpayment. You follow? Do you understand what I mean?

MR. CREANE: Do you mind if I ask questions to try to clarify? (Directed to Mr. Wasik).

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BY MR. CREANE:

Q A person comes in and is referred to a fact-finding examiner because of a question of lack of reasonable effort, do your fact-finding examiners, is there a written policy, do they always tell the claimant, "you can have your hearing in a week or how ever long it will take you to get your witnesses together and you'll get your checks today, anyway, until you get the hearing?" You're not saying that those checks will be paid that day, are you that a person can choose to have the hearing a week or two weeks later?

A Well he can't choose to have it a week or two weeks later, because the hearing would be scheduled five days hence or what have you. I mean as far as that's concerned we would schedule a hearing for him.

Q Or even one day hence. Are you saying that the person will get their two checks for the period?

A If they, let me put it this way. If it's a question that I want to go home this afternoon and I can bring this information back to you, we'd let him go home and bring the information back or he's coming back the next day, we would bring it back, he would bring it back the next day. So you would hold payments for that period of time until he brought back the information. Now you have an issue of a hearing that's being scheduled and I think that's what your referring to.

Q A predetermination hearing or pre-termination hearing?

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A Well sometimes an individual will sit down and they're advised that if they want you can interview them now on the issue or you can interview them at a later time. If he wants a hearing, if he wants a scheduled hearing, as a rule, they will have it then. If an issue arises where they want to have it five days hence, you would pay them and schedule them for a hearing. If an issue comes up where they are going to be denied benefits on the period, it would be an overpayment. Now the, this, how can I say. This rarely happens.

Q Which rarely happens?

A To have a hearing scheduled once they, you know, decide that they, once they are seated and they are being interviewed. But if it does happen we schedule a hearing for them.

Q Under what circumstances would the Department be authorized to pay those checks when there is a question of their actual entitlement to those benefits? When would the person get the checks and get their hearing later on? This is an important question.

A They want payment.

Q What?

A If he wants his payment of benefits.

Q In other words, if a person comes in on reasonable effort to obtain work and he has no signature or two signatures listed on the card, he has an option of getting his checks that

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day and getting a hearing later on? That those checks will be paid even though the--

A I can't remember an incident occurring on effort, let me put it to you that way. But if it would occur according to procedure, he would be paid and then he would be interviewed and if an overpayment would be set-up, if he would be determined that he was ineligible for benefits.

Q Is that written policy? Can you refer me to any specific policy that would authorize the Department to do that?

A I don't know. I can't. Is there one on that, Mr. Wasik?

MR. WASIK: There might have been, well, I don't want to testify.

MR. CREANE: Well perhaps we can list that as another--

THE DEPONENT: I'm trying to think of where that--

MR. WASIK: That's my understanding of what the policy is supposed to be.

BY MR. CREANE:

Q Let me put it this way. To your knowledge, during the past year, has any person who has been referred to a fact-

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finding examiner on the issue of reasonable effort to obtain work, received his checks that afternoon and had a hearing scheduled at a later date to determine whether he was actually entitled to those checks?

A I honestly can't remember.

Q You can't remember an instance?

A I can remember an instance on reasonable effort, in all honesty.

Q Do your fact-finding examiners inform persons of their right to postpone the hearing and that they will get their checks in the meantime until the issue is settled?

A They do inform them. I can't say that they always have on every case. I wouldn't say that.

Q Do you have any explanation as to why apparently so few or maybe no claimants choose to receive their checks that afternoon if they can have the hearing at a later date, if in fact your fact-finding examiners are informing them of that choice?

A No, I can't think of any.

Q So in virtually all, perhaps all, instances of reasonable efforts issues that go before fact-finding examiners, the hearing is held that day and a decision is made that day on eligibility or non-eligibility?

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A Yes. Just about all instances, yes.

MR. CREANE: I want to ask Mr. Wasik, if after checking with your clients in the department, you can find any written regulations which authorizes payment to claimants, that entitles them to postpone the fact-finding hearing and to receive their benefits, I would like to see a copy of that.

MR. WASIK: You don't have it in the letters that we've given you already?

MR. CREANE: No. I'm sorry, Don, I interrupted you. Do you want to finish your questions.

BY MR. WASIK:

Q Is it a clear statement that in reasonable effort cases as opposed to refusal of a job referral, that there seldom are factual issues that have to be resolved with the help of a third person?

MR. CREANE: I would object to the form of that question. I think to ask her to define seldom is too vague a word.

BY MR. WASIK:

Q The usual, what's the usual case? Is there a factual issue in the usual reasonable effort case?

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A Where a third person might be involved? You mean when we would contact an employer to verify that a claimant was there?

Q Something like that.

A There are instances where we do it, yes.

Q But is it a general rule, or not the general rule?

A How can I answer that? It depends on the individual.

Q Based on your experience?

A Based on experience, yes. And it would be on the individual case. If there is some doubt in an examiner's mind to resolve an issue they may use that to verify it.

Q I'm just wondering though, do you know how often this might happen. If this is the usual case or that the usual cases are that there is no question?

A The usual case.

MR. CREANE: I have an objection to this one. I think she indicated that she couldn't really answer that question. That she really couldn't give a fair answer to it.

REDIRECT BY MR. CREANE:

Q On, the question of translaters in your office, for particularly Spanish-speaking claimants, whose responsibility is

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this to provide an interpreter? Is it the claimant's responsibility or the Department's responsibility?

A That's hard to say. I've never really thought of it that way. If we can assist the individual in any way, we would do it. If the claimant can bring someone with him, we just ask them to bring him. I've never considered it being anyone's responsibility other than an attempt to resolve the issue. We try to help them in any way we can but, I've never even, I've never thought of that. If its possible and we can resolve, we can present them with someone to assist them we try to resolve the issue. If we have someone that can do the interpreting in the office, or assist it and he's in the processing of the claim, we do it. If we can't do it we put the burden of responsibility on the individual to present someone who can interpret for him. Very often the examiner on the line, if he sees that there is a language barrier, will ask them to bring someone in to the office.

Q What you're saying I believe, correct me if I'm wrong, is that the Department will be as helpful as its resources will permit, but that ultimately ith the claimant's responsibility to have someone there present, so that he will understand what is being said to him and so that he can present his facts to the Department?

A If we can help them we can. If we can't, we ask him to bring someone, yes.

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Q And that if you can't help him and he doesn't bring anyone, in your opinion, itb his responsibility and you've done all you can?

A What else can we do?

O Well if you ask my opinion you could have sufficient Spanish-speaking personnel so that the Spanish-speaking claimants have the same access to the government services.

A I don't have a problem with Spanish-speaking personnel as far as that's concerned because as I said I have two young ladies that do speak fluent Spanish and they're very good in that respect. We do have say, some Greek people that will come in or Portugese and there just isn't any one that can speak the language. You will get different dialects that are difficult to understand and it's almost impossible to provide you with an interpreter for all of these.

Q Do you have any idea of the approximately the percentage of your claimants that are Spanish-speaking?

A No I don't.

Q You couldn't hazard a rough guess?

A No.

Q The two Spanish-speaking employees that you have, I

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assume are occasionally allowed to go to lunch or they're sick occasionally are they not? There isn't always someone there on duty all times is there.

A No.

Q I have no further questions. Do you Mr. Kelly?

REDIRECT EXAMINATION BY MR. KELLY:

Q I just wanted to ask, you mentioned that you had some employees who were working while they were going to school. Are the two Spanish-speaking employees full-time employees, or are they working only on a part-time basis?

A Full-time basis.

Q Full-time employees. How long have they been with the Bridgeport office.

A They started I think in December of 1971 and January of 1972, I think both of them came in.

Q Prior to that time were there any Spanish-speaking employees in the Bridgeport office?

A I became manager in December of 1971, so I can't.

Q Did you work in that office before?

A Years ago.

Q O.K. But in that period, say from December of 1971, back five years ago, you have no knowledge of what the employment situation was?

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A No I haven't. It wouldn't be, it was very vague. I wouldn't know of the staffing pattern.

Q What is the employment, what is their job title, these two Spanish-speaking employees?

A Employment security aides.

Q Level?

A Yes, I think they're two.

Q Two. Both of them are level two?

A I think so.

Q And that they wouldn't be involved in fact-finding determinations?

A No.

Q I have no further questions.

BY MR. CREANE:

Q Just one final question. The fact-finding examiners when they're hired, what type of training or experience are they given before they begin their actual duties?

A Well, it varies. There is a certain amount of training that I, as a manager, would give them.

Q Would you describe that?

A They have the policy letters that I give them to read and review. We have, they're acquainted with the Interpretive Digest, the laws, the fact-finding forms. Brief basic

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outlines as to what they would need to compile into a report. Discussions on the various types of fact-findings that may arise. They're told about the inserts, I acquire some books for them on interviewing. They start with some of the simpler cases, sort of an on the job training. Their cases are reviewed by the supervisor and go through a six-month probationary period and any unusual cases that arise are discussed. They're always free to ask any questions that may arise, to check anything that we have available in the office. If anything unusual comes up, it's referred to the adjudication unit in Hartford.

Q Of the nine fact-finding examiners that are presently working there, how many have come to work in your office during the past year? How many of them were working there a year ago?

A I think all but one. They weren't all working in the capacity of fact-finders. They were promoted. One came from another office up state. She was promoted and given the appointment in the Bridgeport office. The other..

Q So, how many were working as fact-finders a year ago? If you don't know, don't answer.

A I'd say four or five.

Q Out of a total of how many fact-finders a year ago?

A Actual fact-finders, were two. There was another title for a group that were brought in and they were brought in to train for fact-finding. I can't think of the title off-hand.

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MR. KELLY: Excuse me, were they called the intermittent claims examiner?

THE DEPONENT: Oh, no. I'll get that name for you if you'd like because I know that they had a different title for that. But then they were appointed, they took the exam and were appointed as fact-finders. They worked in the capacity of fact-finders.

BY MR. CREANE:

Q You indicated in response to a question from Mr. Wasik that in normal times, whatever they might be, that it is the practice to give periodic redeterminations?

A Periodic interviews, yes.

Q And what is the, how does that work?

A Well, initially--

Q By the way, are we in normal times now at the Bridgeport office? Are periodic redeterminations given on regularly scheduled basis?

A Not quite. The claimant is given a benefit rights interview and all the eligibility requirements are explained to them. Then they file their first compensable claim.

Q And when the workload is not?

A When the workload is normal, we are operating normally, their eligibility requirements are all explained and during

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the course of this interview any questions that may arise with them are discussed. All the, and the examiner will determine at that time the type of work the individual is looking for, the amount, the age of the individual, the marital status of woman, man and whether or not there may be any factors that would involve his availability for employment. And then they're coded for periodic re-interviews.

Q How does that work, the periodic re-interviews?

A Well, say for a woman that has children and she's seeking work. She was laid off, or she quit her job because she has a problem, a babysitting problem, what have you. She quit her job, she's now available for work and she's looking for work. She meets the eligibility requirement at this time and we would probably re-code her for an interview every fourth week.

Q So that the re-coding for a periodic reinterview--

A She would be re-coded.

Q Would be if there was some special circumstances?

A Special circumstances that may be involved.

Q But it doesn't mean that everyone would be coded for a periodic interview?

A Every fourth week, no. And then an older person who is available for work and making efforts to get work, seeking work we may code him or her every six or eight weeks depending on what the circumstances are.

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Q That answers my question.

A It would be set in that manner.

MR. CREANE: Don, do you have any further questions.

MR. WASIK: No.

MR. CREANE: Thank you very much Mrs. Smars.

THE DEPONENT: Now you mentioned something, let me clarify a point. You mentioned something about the hearings and there was something that I wanted to clarify with you. As I explained that when an individual is seated for a hearing, now, and this is one point that I try to stress with my people that they can have the hearing now or the hearing, is they can have it scheduled for them and if it is rescheduled they are paid their benefits. You asked me why I thought there were so few of those re-scheduled hearings. Wasn't that one question that you asked?

MR. CREANE: Well, in fact, so few that you could not recall a single instance where on the issue of reasonable effort.

THE DEPONENT: For reasonable effort it has arisen.

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MR. CREANE: Yes.

THE DEPONENT: I can't really recall it. We give them a brief explanation that they have the right to have a hearing now or the hearing later and they choose now, so we just proceed with it.

MR. CREANE: Do you know if your fact-findin examiners always tell the person that they can get their checks now if they choose to have their hearing later?

THE DEPONENT: No, I can't honestly say that they would probably say that. And this is one thing I wanted to clarify with you. But if an issue does arise, and the individual does say that, does request to have a hearing scheduled, he is paid and that's the procedure that follows. If it's determined at the hearing that he is ineligible for benefits an overpayment would be set up.

MR. CREANE: But, that is, ordinarily, the claimant would be told you can have the hearing now or you can have it later?

THE DEPONENT: Then they elect.

MR. CREANE: O.K. Thank you very much.

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STATE OF CONNECTICUT)
) ss. March 20, 1973 Bridgeport
COUNTY OF FAIRFIELD)

I, Margarita Torres, an employee of Bridgeport Legal Services, Inc., do hereby certify that the deposition of MRS. ELEANOR H. SMARZ was taken under oath before me pursuant to Rules 30 (a) and (b) (4) of the Federal Rules of Civil Procedure, at 412 East Main Street, Bridgeport, Connecticut on Thursday, February 8, 1973 at 1:45 p.m.

I further certify that the witness was sworn by Attorney Ira Horowitz to tell the truth, was examined by counsel and her testimony was recorded on tape and was subsequently transcribed by me as herebefore appears.

Dated At Bridgeport, Connecticut, this 20th day of March, 1973.

Margarita S. Torres

Margarita S. Torres

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STATE OF CONNECTICUT
LABOR DEPARTMENT
Employment Security Division
Pl. Ex. 14 Unemployment Compensation Department

92 Farmington Avenue
Hartford 15, Conn.

SES BULLETIN NO. 15
December 8, 1955

TO: ALL U. C. MANAGERS AND FACT FINDING EXAMINERS IN LOCAL OFFICES

1. Due to the snowstorm and resulting prospects of dangerous driving conditions, the conference of fact finding examiners and claims supervisors which was held in Central Office on Friday, December 2, 1955, on the subject of writing non-monetary determinations was ended sooner than had been planned. Because of the premature closing of the conference, the subject matter intended to be covered was not presented in its entirety. At the time the meeting was called to a halt, the general subject of "clarity" of non-monetary determinations had been fully presented and discussed and we were mid-way through the general subject of "completeness." With reference to this subject we had pointed out that "completeness" of a non-monetary determination requires the presence of four elements: (1) statement of the law which is determinative of the issue; (2) statement of the facts on which the decision is based; (3) statement of the reasoning used in arriving at the conclusion; and (4) the conclusion. When the conference was ended we had discussed in detail the elements of the law and the facts; the elements of the reasoning and conclusion were left to be discussed.

2. We had considered our proposed presentation and discussion of the element of "reasoning" as the most important part of the entire subject of writing non-monetary determinations and were disappointed that the opportunity for this presentation and discussion was lost by the early adjournment of the meeting. It was intended to put particular stress and emphasis on the "reasoning" part of non-monetary determinations because of the fact that we have not heretofore included this element in our written determinations. In the past, a non-monetary determination has been considered adequate if it contained a statement of the pertinent law, the facts on which the decision was based, and the conclusion. Our written determinations will henceforth contain an additional element - a statement of the reasoning used in arriving at the conclusion.

3. The material which we had intended to present by way of coverage of the elements of the reasoning and conclusion in a non-monetary determination appears in full detail in pages 10, 11, and 12 of the "Manual on Writing Non-Monetary Determinations," copies of which were distributed at the conclusion of the meeting. Fact finding examiners are urged to study and digest the contents of pages 10, 11, and 12 of the Manual which pertain to these elements. It is suggested that fact finding examiners make a study of the sample determinations appearing on pages 13, 14 15, and 16 of the Manual, with a view toward observing the application of the "reasoning" element in a non-monetary determination.

4. Effective December 19, 1955, all non-monetary determinations in cases of availability, leaving work, discharges, and refusal of referral to or offer of work will contain, in addition to the customary facts and conclusion, the reasoning used in arriving at the conclusion. Inserts 1 and 2 in the current list of authorized decision — inserts will no longer be used, since, in decisions on refusals of referral to or offer of work, the determination must henceforth contain a statement of the "reasoning" as indicated above. Similarly, the use of insert 9 (Lack of Effort) in the list of authorized inserts, is to be discontinued. With respect to the required determination in this type of case, attention is directed to the sample determination appearing under (5) on page 7 of the Manual.

Morris E. Tonken
Special Review Unit

Approved:

George J. Walker
Director

STATE OF CONNECTICUT
LABOR DEPARTMENT
Employment Security Division
Pl. Ex. 15 Unemployment Compensation Department

92 Farmington Avenue
Hartford 15, Conn.

February 27, 1956

TO: ALL U.C. MANAGERS AND FACT FINDING EXAMINERS IN LOCAL OFFICES

During the past several weeks we have made a careful and detailed study of cases in which the local office decision was reversed by an unemployment commissioner. Of the various different issues which were found to have been included in these cases, the issue of leaving work was perhaps more prominent with respect to the questions raised by the reversals in connection with the manner in which the cases were originally handled by the local office. In the leaving work category of cases there seems to be the greatest variance between the local office examiner's finding of facts and the unemployment commissioner's finding of facts. Cases have been repeatedly observed in which the reason for the quit as found by the commissioner was completely different from the reason for the quit as found by the fact finding examiner. It is frequently found that the fact finding report indicates, in the claimant's version, more than one reason for the quit, in which case the examiner has based his decision on his application of one of these reasons; whereas the commissioner has found that the motivating reason for the quit was not that chosen by the local office examiner, but was rather one of the other reasons which had been mentioned to the fact finding examiner by the claimant in the course of the interview and which had been referred to in the fact finding report. For example, the fact finding report indicates that the claimant had quit his job because his employer had refused his request for expense money to defray the costs of commuting a considerable distance to and from work - the report mentions, more or less in passing, that daily driving of this considerable distance, has been aggravating his sacroiliac condition - the commissioner finds that the aggravation of claimant's sacroiliac condition motivated the quit, rather than the employer's refusal to pay expense money.

The situation presented by the above type of case as well as other similar cases which have been observed in our survey raises a definite possibility that the leaving work cases involve an area in which our fact finding examiners must be particularly astute and direct special attention in their fact finding interviews to uncover and determine the specific and actual reason for the claimant's quit. Where the claimant assigns more than one reason for his quit, it is incumbent on the examiner to determine whether any one reason of those expressed was the specific reason which impelled the quit. Where there is an inference or an implication that claimant quit his job for a reason in addition to that specifically expressed by the claimant, the reason so raised by inference or implication should not be ignored by the examiner; in such case, the examiner should determine, after careful questioning, whether that reason was

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February 27, 1956

or was not the motivating cause of the quit. In other situations, where the reason for the quit as expressed by the claimant is obscure, ambiguous, or of doubtful authenticity in the light of the particular circumstances of the case, it is incumbent on the examiner to continue and pursue a line of questioning designed to discover the real and actual reason for the quit.

Fact finding examiners are urged to direct particular attention to fact finding interviews in "leaving work" cases in the light of the above comments.

(s) George J. Walker
Director

Pl. Ex. 16

STATE OF CONNECTICUT

LABOR DEPARTMENT — EMPLOYMENT SECURITY DIVISION
92 FARMINGTON AVENUE · HARTFORD 15, CONNECTICUT

UNEMPLOYMENT COMPENSATION DEPARTMENT

October 22, 1956

Disputed Claims Policy Letter, SHU, AGCH

TO: ALL U. C. MANAGERS

SUBJECT: Statutory Requirement of "Reasonable Efforts to Obtain Work"

1. Statutory Provision

One of the conditions of eligibility for benefits prescribed by our Unemployment Compensation Law is that the claimant "has been and is making reasonable efforts to obtain work." (Section 7507 (2)).

2. What constitutes "Reasonable Efforts?"

"Reasonable efforts to obtain work" are such efforts as we would ordinarily expect anyone to make who is honestly looking for work. Just how much effort is required to satisfy this condition cannot be set down under any hard and fast rule. Aside from the efforts which we require elderly persons to make, as discussed below, the extent to which a claimant is required to make such efforts in order to characterize them as "reasonable" efforts within the meaning of the law depends upon several varying factors - labor market conditions prevailing at the particular time, claimant's physical condition, the length of claimant's unemployment, the extent to which the claimant's union serves as an exclusive hiring agent, etc. For example, where, in a given area, there are numerous potential sources of employment which may provide opportunities for such work as the claimant desires, a reasonable effort to find work on his part will require more numerous and frequent employer contacts. If, however, there is very little hiring taking place because of depressed economic activity and the Employment Service has most of the existing jobs listed in its files, then a less complete round of visits to possible employers is indicated. Similarly, where, by virtue of union regulations, a claimant's sole source of employment is his union agent, constant contact with the union agent would constitute a reasonable effort to obtain work. It is not intended to require claimants to make futile trips to employers' hiring offices just for the sake of building up a record of job seeking. Similarly, where the claimant is afflicted with a physical disability which is not so serious as to negative his eligibility for benefits but is of such nature as to restrict his physical mobility, a less concerted program of employer contacts by such claimant is indicated.

3. Procedural Application of "Reasonable Efforts" Requirement

In connection with the application of the "reasonable efforts" requirement of the law from a procedural standpoint, attention is directed to the procedure described in the Chief of Benefits' Memorandum No. 153, DA 26, subject: "Procedure for Periodic Reinterviews," dated June 30, 1954.

4. Requirement of "Reasonable Efforts to Obtain Work" With Respect to Claimants Fifty-five Years of Age and Over

It has become increasingly apparent that present labor market conditions are such that the prospects of obtaining work are not generally favorable to persons fifty-five years of age and over. Where there is an adequate supply of labor among the younger element of the labor force, the older element is inevitably pushed into the outer fringe of the labor pool. Since we recognize that persons fifty-five years of age and over find it difficult to obtain work through the medium of independent search, it is undesirable to require such persons to make an independent search for work. As stated above, "it is not intended to require claimants to make futile trips to employers' hiring offices just for the sake of building up a record of job seeking." In view of the status of the elderly worker in today's labor market, the conclusion is reached that the maintenance of an active registration with the Connecticut State Employment Service constitutes "reasonable efforts to obtain work" with respect to all claimants fifty-five years of age and over.

Very truly yours,

George J. Walker

George J. Walker
Director

Approved:

Joseph S. Gibbons
Executive Director

Prepared by Special Review Unit

mt

Pl. Ex. 17

STATE OF CONNECTICUT
LABOR DEPARTMENT
Employment Security Division
Unemployment Compensation Department

92 Farmington Avenue
Hartford 15, Conn.

R & A Bulletin No. 20
August 20, 1958

TO: ALL U. C. MANAGERS AND FACT FINDING EXAMINERS

1. Cases have come to our attention in which the claimant has been denied benefits because of an unreasonable restriction on his availability and, upon filing a claim for the week immediately following the disallowed claim, he advises the examiner of his removal of the restriction in question. The claimant's claim series is then reinstated and his eligibility is established.

In cases such as that described above, it is sometimes true that if the claimant had been advised by the examiner that the restriction which he has imposed on his availability will require a finding of ineligibility, the claimant would have immediately reconsidered his employment desires and withdrawn his stated restriction. The withholding of benefits from the claimant for one week without advising him of the reason for such action before the issuance of the decision and the granting of benefits for the next week in consequence of his declaration of compliance with the availability requirement after being notified of the reason for his ineligibility is neither an equitable nor a realistic method of handling this situation. In any case in which the claimant's expressed restriction on his availability is such as to compel a finding of ineligibility, the fact finding examiner must orally advise him, before issuing a written decision of disapproval, that the restriction in question has the effect of making him ineligible for benefits. If the claimant, despite such advice, adheres to the restriction, a decision of disapproval is in order. If, however, the claimant reconsiders his employment desires and, in the light of the examiner's advice, withdraws his restriction, thereby putting himself in compliance with the availability requirement, an award of benefits is in order.

R & A Bulletin No. 20
August 20, 1958

2. Cases have been observed in which the claimant is initiating a claim series after childbirth and despite the fact that the ending date of the two month period after childbirth falls within the first benefit week for which a claim is filed, such claim is approved by the local office examiner. The approval of such claim is contrary to law.

Where the claimant is claiming benefits two months after childbirth, the first week for which she may be eligible for benefits is the week which, in its entirety (exclusive of Sunday), is beyond the ending date of the two month period following the date of childbirth. Thus, if the two month period ends on Monday of the first week for which the claimant claims benefits, the claimant is ineligible that week.

Morris E. Tonken
Review and Appeals

Approved:

Joseph J. Gibbons
Executive Director

Pl. Ex. 27

FORM ESD-20
REV. 8-70

INTEROFFICE MEMORANDUM

TO: ALL LOCAL OFFICE MANAGERS, FIELD AND CENTRAL OFFICE SUPERVISORS

DATE: JUNE 30, 1972

FROM: John F. Pescatello, Chief of Benefits

SUBJECT: CONTINUED CLAIM WORK EFFORT INFORMATION FORM (UC 45)

The form is to be used for all intrastate continued claims. It is to be given to all claimants and they will be required to return it on their next scheduled visit. Completed forms will be retained in the Claim Record Card and are to be used as an indication of the claimant's search for work. A factfinding interview should be scheduled, as space and time permit, for those claimants that indicate that their search for employment or availability is questionable. Checks should not be issued to claimants that show they did not look for work (unless there is a valid non-disqualifying reason) without a factfinding interview that clearly establishes their eligibility.

Lines should not be held up for claimants to fill out this form. It should be completed and signed by the claimant before reporting to the office.

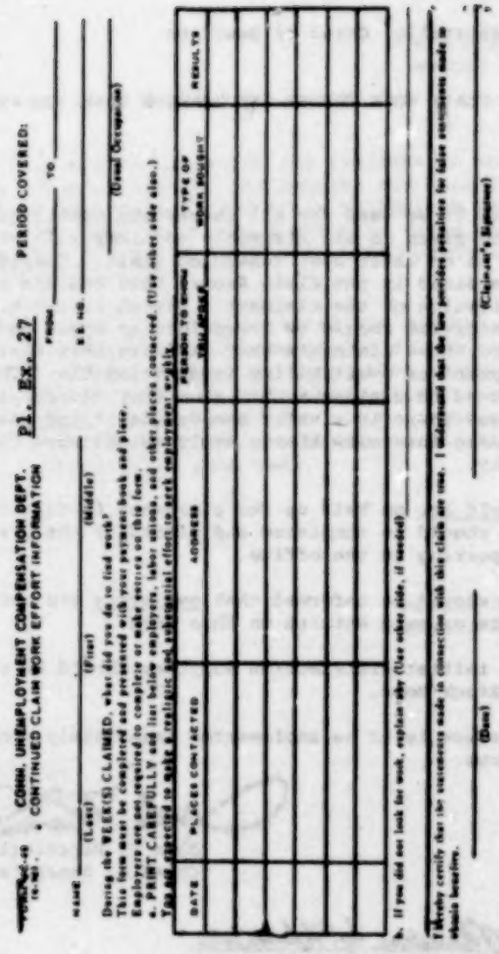
Claimants should be informed that employers are not required to complete or make entries on this form.

After the initial distribution supplies should be reordered from the Stock Room.

This procedure is to be implemented immediately upon receipt of the forms.

John F. Pescatello
Chief of Benefits

APPROVED: Theodore W. Hatcher
Theodore W. Hatcher
U.C. Director



CONN. UNEMPLOYMENT COMPENSATION DEPT. Pl. Ex. 27
CONTINUED CLAIM WORK EFFORT INFORMATION

PERIOD COVERED: From _____ To _____

NAME _____ (Last) _____ (First) _____ (Middle) S.S. NO. _____

During the WEEK(S) CLAIMED, what did you do to find work?
This form must be completed and presented with your payment book and plate.
Employers are not required to complete or make entries on this form.
• PRINT CAREFULLY and list below employers, labor unions, and other places contacted. (Use other side also.)
You are expected to make a realistic and substantial effort to seek employment weekly.

DATE	PLACES CONTACTED	ADDRESS	PERSON TO WHOM YOU APPLIED	TYPE OF WORK SOUGHT	RESULTS

b. If you did not look for work, explain why (Use other side, if needed) _____

I hereby certify that the statements made in connection with this claim are true. I understand that the law provides penalties for false statements made in this connection.

_____ (Date) _____ (Claimant's Signature)

John J. Egan
Administrator
Howard E. Hausman
Executive Director

STATE OF CONNECTICUT
LABOR DEPARTMENT
EMPLOYMENT SECURITY DIVISION
UNEMPLOYMENT COMPENSATION DEPARTMENT

92 Farmington Avenue
Hartford 15, Conn.

Pl. Ex. 28 b

SRU BULLETIN NO. 8
May 19, 1953

To: All U. C. Managers and Fact Finding Examiners

1. Special Review Unit has observed numerous local office decisions denying benefits for restricted availability which cannot be said to be supported by the facts appearing on the accompanying fact finding reports. These are cases in which the findings of fact as presented in the fact finding report raise nothing more than a mere inference or an implication that the claimant is imposing a restriction on her availability - and it must be remembered that a decision based on inference or implication is as vulnerable as a decision based on presumption. The fact finding reports in these cases are completely defective since they do not contain complete coverage of the question whether an actual restriction exists, and, conversely, the decisions are questionable since they are not supported by the facts appearing in the fact finding reports. For example:

FFR: "Clt has been unemployed for 2 months - seeking work as a grinder or machine operator - believes she should receive at least $1.15 an hour."

Decision: "By limiting your employment prospects to work paying at least $1.15 an hour, you have placed so severe a restriction on your availability for work as to render yourself, in effect, unavailable for work and therefore ineligible for benefits."

The mere fact that the claimant believes herself to be entitled to at least $1.15 an hour cannot compel a sound conclusion that the claimant will not accept employment which pays less than that figure. Hence, her statement does not support a conclusion that she has imposed a restriction on her availability. The contents of the above quoted report are a sufficient indication to a reviewer that the examiner, in the course of interviewing the claimant, failed to pursue his line of questioning to an ultimate conclusion. He obviously failed to ascertain from the claimant whether she will or will not accept employment paying less than $1.15 an hour. In the absence of a statement to this effect in the fact finding report, there is no support for the examiner's conclusion that the claimant has unreasonably restricted her availability.

In fact finding reports on the issue of restricted availability, such expressions as "prefers first shift," or "would like job from 11 A.M. to 3:30 P.M.," or "wants job within walking distance of home," or "would rather not work for less than .95 an hour," should not appear without an explanatory elaboration, obtained from the claimant, as to whether the stated preference actually constitutes a specific limitation on the employment the claimant is willing to accept. In fact, such reports must contain an unequivocal statement whether the claimant will or will not accept employment outside his stated preference.

2. Despite previous discussions of the import of General Letter 163, cases still appear in which local offices have failed to observe the procedural requirements prescribed in that letter relative to the transmittal of Additional Claims attached to the fact finding reports directly to Special Review Unit, where the Additional Claim is filed under such circumstances as to invoke application of General Letter 163. We have observed recurring instances of "163" cases in which local offices have transmitted the Additional Claim and fact finding report, each through normal channels, with the result that an unnecessary merit rating charge problem is created in Central Office.

It is recommended that the above mentioned transmittal procedure be rehearsed at the next training session in each local office.

Morris E. Tonkon
Special Review Unit

Approved:

Howard K. Hausman
Executive Director

John J. Egan
Administrator
Howard K. Hausman
Executive Director
George J. Walker
Director

STATE OF CONNECTICUT
LABOR DEPARTMENT
EMPLOYMENT SECURITY DIVISION
UNEMPLOYMENT COMPENSATION DEPARTMENT

92 Farmington Avenue
Hartford 15, Conn.

SRU BULLETIN NO. 10
November 19, 1953

Pl. Ex. 28 c

TO: ALL U.C. MANAGERS AND FACT FINDING EXAMINERS

1. SRU has observed repeated cases in which a fact finding examiner has approved a claim for benefits filed by the claimant after a prolonged period of illness or serious disability and in the fact finding report which is submitted as a confirmation of the claimant's eligibility no reference is made to a medical certification of the claimant's physical ability to work. The burden of proving his eligibility for benefits rests with the claimant and the responsibility of eliciting such facts as are necessary for the claimant to sustain that burden rests with the fact finding examiner. Should there be any doubt of the claimant's physical ability to work, the examiner is remiss in his responsibility if he approves the claim without having required the claimant to present such evidence, if obtainable, as will dispel the doubt. Thus, in any case in which the nature of the claimant's ailment is such as to create a reasonable doubt of his employability or physical ability to work, particularly where he has been under medical care for a prolonged period of time, he should be required to produce a statement from his physician attesting his recovery and ability to work. Such certification must be incorporated into the fact finding report.

2. Where the claimant has retired from his last employment voluntarily and without having asked his employer for a change of work, there is a prima facie presumption of unavailability. To establish his eligibility for benefits, the claimant must satisfactorily rebut this presumption by showing reasonable efforts to obtain work and freedom from unreasonable restrictions on his availability. We have observed numerous fact finding reports written in such cases, which fail to present facts that prove a successful rebuttal of the presumption of unavailability. The bland statement "Actively seeking work" is clearly inadequate to support a finding of eligibility. The report must specifically enumerate the employers whom the claimant has contacted, the dates such contacts were made, and the type of work claimant was seeking. The report must further cover the entire area of possible restrictions on availability--that is, whether there are any restrictions as to wages, hours, or occupation.

In view of the fact that a voluntary retirement creates a prima facie presumption of unavailability, fact finding examiners are cautioned to exercise particular care in investigating claims filed by voluntarily retired persons, with a view toward establishing such facts as are required for the claimant to rebut the presumption of his unavailability.

3. Where a female claimant files for benefits after childbirth and, by her own admission, has not earned the required $100 which would be necessary to establish her eligibility, the question of her availability is not in issue. However, SRU has observed repeated fact finding reports in such cases in which the examiner has presented a detailed description of child care provisions, absence of restrictions on availability, etc., which factors are, at the moment, irrelevant to a determination of the claimant's eligibility. Since, in such cases, the claimant's availability or ability to work is not

in issue, facts bearing on her availability or ability to work have no place in the fact finding report and should not appear in the report. Coverage of availability and ability to work in such cases is entirely unnecessary and represents a waste of the fact finding examiner's time.

Morris E. Tonkon
Special Review Unit

Approved:

George J. Walker
Director

STATE OF CONNECTICUT
LABOR DEPARTMENT
Employment Security Division
Unemployment Compensation Department

Pl. Ex. 28 d

92 Farmington Avenue
Hartford 15, Conn.

SRU BULLETIN NO. 16
April 16, 1956

TO: ALL U. C. MANAGERS AND FACT FINDING EXAMINERS IN LOCAL OFFICES

1. The recent re-evaluation by central office personnel of local office evaluations of fact finding reports and decisions reveals that progress has been made in the continuing drive toward improvement of our fact finding and decision making operations. It is our observation that the degree of improvement in the decision writing operation has been considerably more extensive than that in the writing of fact finding reports. Observation of the content of local office written determinations shows positive evidence of an improvement in the performance of this phase of our operations. As a result of the local office adoption and use of the criteria introduced at the central office training sessions that were conducted last fall, our local office written determinations are now found to be more expressive, more meaningful, and more individualized than they have been in the past. It is expected that further progress will be achieved by continuing attention being directed by managers and fact finding examiners to achieving a more complete compliance with the basic elements and requirements of decision writing as they are presented in the "Manual on Writing Non-Monetary Determinations."

2. Evaluation of the fact finding reports discloses the following areas of inadequacy which require special attention:

   a. Clarity of presentation

      There is still a tendency on the part of some examiners to report facts in fact finding reports with a degree of vagueness and indirection with the result that, where this occurs, facts in the fact finding reports are not articulate and precise. There is an urgent necessity for required facts to be recorded in fact finding reports in direct, unequivocal, and positive language so that there is no room for conjecture as to the meaning or purport of such facts in relation to the whole case.

   b. Sufficiency of facts

      This is found to be a problem particularly in cases involving quits and restricted availability.

      Where there is an intimation that the claimant quit his job for more than one reason, one disqualifying and the other not, the contents of fact finding reports in such cases often suggest a failure by the examiner to explore the surrounding circumstances with a view toward determining which was the motivating reason for the quit. There is room for improvement in interviewing technique in this area.

[-2-]

SRB BULLETIN NO. 16
April 16, 1956

Fact finding reports in cases in which the claimant has been denied benefits because of a restriction on his availability are frequently found to lack such facts as are necessary to show that the restriction in question is an unreasonable one - that is, that the nature of the restriction is such that it constitutes a serious and substantial impediment to claimant's employability. In such cases, the conclusion reached and declared by the examiner is vulnerable since it is not supported by facts in the fact finding report. This type of situation points up a need for improvement in the process of recording the facts, if not in the interviewing technique.

c. Exhaustion of Sources, Rebuttals, etc.

The requirement of an opportunity for rebuttal is too often ignored in cases in which claimant and employer have offered inconsistent versions of the circumstances of a separation. This area is one of vital importance and merits close attention and correction since the validity and propriety of decisions is often affected by the denial of an opportunity for rebuttal.

Morris E. Tonken
Special Review Unit

Approved:

George J. Walker
Director

STATE OF CONNECTICUT
LABOR DEPARTMENT
Employment Security Division
Unemployment Compensation Department

Pl. Ex. 28 e

92 Farmington Avenue
Hartford 15, Conn.

R & A Bulletin No. 22
May 13, 1959

TO: ALL U. C. MANAGERS AND FACT FINDING EXAMINERS

1. The "Comment" section of the fact finding report form is intended to afford the fact finding examiner an opportunity to include in his report any material which is not factual and therefore is not a part of the factual content of the report itself but which may have been utilized by the examiner in the process of arriving at his decision. For example, the "Comment" section may quite appropriately carry the examiner's personal remark concerning a doubt in his mind of the claimant's credibility and an explanation of the reason for that doubt. There are numerous other entries which may well appear in the "Comment" section, depending on the peculiar facts or nature of the case that is the subject matter of the report. There is one entry, however, that must be included as a "Comment" in all fact finding reports in which the examiner is called upon to employ a process of reasoning in arriving at his decision: there must be a brief description of the reasoning used by the examiner in resolving the issue at hand. It is emphasized that a description of the reasoning must be inserted in the "Comment" section where the reasoning has led to an approval of the claim in issue as well as where a decision of disapproval is being issued.

   Fact finding examiners are urged to observe the above stated requirement in completing their fact finding reports.

2. The Review and Appeals Section has observed numerous decisions in which the decision insert, in referring to a specific date, identifies the month by a numerical designation - e.g., "5/13/59." It has also been observed that the period of ineligibility in decision letters often describes the months by the use of numerical designations - e.g., "5/3/59 to 6/6/59." Such numerical designations of months are not an approved method of describing dates in formal letters and their use in decision letters, or in any correspondence with persons outside the agency, is to be discontinued. In such forms of correspondence, months of the year are to be spelled out in full.

3. Recent fact finding reports on labor disputes have been found to be inadequate in their coverage of necessary factual material. As a result, the Review and Appeals Section has frequently found it necessary to request from the local office a supplemental report which would include factual information omitted in the original report. Where this occurs, the time lapse in rendering the determination is extended unnecessarily.

   Fact finding reports on labor disputes are to be carefully reviewed by local office managers before transmittal to the Review and Appeals Section. The purpose of the review is to insure that the report contains a complete coverage

[-2-]

R & A Bulletin No. 23
May 13, 1959

of all factual information necessary for a determination of the issue. In connection with this activity, attention of the managers as well as the fact finding examiners is directed to the Fact Finding Guide Cards on "Labor Dispute (Strike)" and "Labor Dispute (Lockout)".

Morris E. Tonken
Review and Appeals

Approved:

Harold E. Hills
Director

FORM ESD-38 (REV. 3-70)

INTEROFFICE MEMORANDUM

Pl. Ex. 29 m

TO: ALL LOCAL OFFICE MANAGERS, FIELD AND CENTRAL OFFICE SUPERVISORS

DATE: October 6, 1972

FROM: Theodore W. Hatcher, U.C. Director

SUBJECT: CLAIMANTS MUST BE ADVISED OF THEIR RIGHTS

At the recent meeting of managers, Commissioner Fusari and our Executive Director Mr. Eisenman reiterated and confirmed the policy of this department.

Claimants are to be fully advised of their rights, informed clearly and unequivocally what section or sections of the law are involved, and they should be informed of what they are expected to do by way of job search and exposure to the labor market. This is not to say that claimants should be told how to "beat the system", but a claimant under the law, as interpreted by many court decisions, is entitled to know the law and know why he or she is being declared ineligible or disqualified for benefits.

If a person restricts his availability or indicates a job type preference which turns out to be restrictive, the claimant should be told that he or she could disqualify himself or herself.

Now that the claim load is at a lower level we expect that all claimants will receive a Benefits Rights Interview and that periodic reinterviews are accomplished.

Please see that these instructions are given to all employees that are involved.

Theodore W. Hatcher
U.C. Director

TWH:EJT:im

FORM 320-34 (REV. 8-70)

INTEROFFICE MEMORANDUM

Pl. Ex. 29 o

TO: All U.C. Managers and Field Supervisors DATE Nov. 16, 1972

FROM: Chief of Adjudications

SUBJECT: Advising and Counseling Claimants

The following directive has been received from Executive Director Carl D. Eisenman:

> "A directive was previously issued requiring local office personnel of both ES and UC to advise claimants and clients when their conversation, course of conduct, or other acts or omissions may result in disqualification or declaration of ineligibility. Since the directive has been issued, there have still been instances where, for example, senior citizens were not advised that their Social Security restriction would result in disqualification and where geographical preferences, as opposed to restrictions, resulted in disqualifications. Please reemphasize that we are here to serve the public and to properly administer the law and that proper administration requires complete candor and fairness with all. Questions should not be phrased with a result in mind. If, during questioning, a claimant appears to be unaware of the applicable provision of the law, he should be advised of it."

Local office managers and fact finding examiners are requested to comply with Mr. Eisenman's directive to the fullest extent and without further delay.

Morris E. Tonkon
Chief of Adjudications

Approved:

Theodore W. Hatcher
Director

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA, AND JUAN MIRANDA, et al, PLAINTIFFS,	CIVIL ACTION NO. 15104
v.	May 12, 1973
JACK A. PUSARI, Commissioner of Labor, The Administrator, The Unemployment Compensation Act, State of Connecticut, DEFENDANT.	

PLAINTIFFS' EXHIBIT 31

TIME LAPSE ON DECIDING APPEALS TO THE UNEMPLOYMENT COMPENSATION COMMISSION

This exhibit provides a more detailed breakdown of data provided in Section B,#6 of U.S. Department of Labor Form E.S.-221 (Plaintiffs' Exhibit 1) for the month ending December 31, 1972. Form E.S.-221, Part B,#6 for December, 1972 provides a breakdown of the lapsed time from the date a claimant filed an appeal to the date the Commissioner's written decision on the appeal was mailed. Plaintiffs' Exhibit 31 provides a more detailed " Time Lapse" breakdown of the 461 intrastate appeals disposed of by written decision during December 1972. The 72 interstate appeals are not included in this exhibit since these cases generally involve even longer delays encountered in obtaining work and wage records from states in which the claimant worked before moving to Connecticut.

[2]

Plaintiffs Exhibit 31 (cont.)

The data in this exhibit was obtained in two ways. The figures from Unemployment District #4 were supplied, pursuant to subpoena, by the Chairman of the Unemployment Compensation Commission, Timothy J. Loughlin, at his deposition on February 8, 1973, at Bridgeport. The data for the remaining Districts was compiled on February 16, 1973, per agreement between Plaintiffs' attorneys and Mr. Loughlin, from Unemployment Compensation Commission records by clerical personnal under the supervision of plaintiffs' attorneys.

3

Plaintiffs Exhibit 31 (cont.)

TIME ELAPSED BETWEEN DATE CLAIMANT FILED APPEAL AND DATE UNEMPLOYMENT COMMISSIONER MAILED DECISION TO CLAIMANT

DIST.#	0-30	31-45	46-75	76-100	101-125	126-150	151+	Total
1	-	-	7	17	56	49	18	147
2	-	-	-	10	32	18	17	77
3	-	-	1	3	-	16	5	25
4	1	2	1	4	43	54	17	122
5	-	-	-	1	-	10	79	90
TOTAL	1	2	9	35	131	147	136	461
PERCENTAGE								
1	-	-	4.8	11.6	38.1	33.3	12.2	
2	-	-	-	13.0	41.5	23.4	22.1	
3	-	-	4.0	12.0	-	64.0	20.0	
4	0.8	1.6	0.8	3.3	35.2	44.3	14.0	
5	-	-	-	1.1	-	11.1	87.8	
TOTAL	0.2	0.4	2.0	7.6	28.4	31.9	29.5	

Pl. Ex. 32

AFFIDAVIT

I, DELIA TRIANA, being duly sworn, depose and say:

1. I reside with my husband and four children at 153 Lewis Street, Bridgeport, Connecticut.

2. I was recently laid-off from my job at the General Electric manufacturing plant in Bridgeport, Connecticut because of lack of available work.

3. Immediately thereafter, I applied for unemployment compensation benefits at the Bridgeport Office at 67 Washington Avenue.

4. I was certified as eligible by the unemployment compensation office and received $61.00 a week unemployment benefits for three weeks, ending the week of July 10th, 1972.

5. I do not understand written or spoken English and since the unemployment office did not supply an interpreter on the occasion of my visits, I was required to bring and was told to bring my own interpreter. I was required to bring one of my young children to the unemployment office when I visited.

6. In early July, I was told, through my child interpreting, that I must take one of the forms that was given to me and get prospective employer to sign the card indicating I had visited and asked for employment.

7. I had the cards signed by several employers during the period after July 10th, 1972 but on both occasions when I went to the unemployment office (at two weeks intervals) I was told that not enough employers had signed the card. I did not fully comprehend what was being asked of me and again asked for an interpreter and was told to get one for myself.

8. In late July, I was told that I should have six employers sign the card. My next appointment at the unemployment office was on August 7th, 1972 and on that occasion my card had been signed by six employers stating that I had applied for work at their offices.

9. On August 7th, 1972 I was again refused an unemployment check and was told that while I had six employers sign the card, they had all signed the card on the same day and that this disqualified me from unemployment benefits since I had not spread the six employers out over the two-week period. I tried to explain to the officials that since I did not speak English, I could only go on Fridays when one of my children could accompany me to do the interpreting. I was told that this was unsatisfactory and that I was disqualified indefinitely from receiving benefits from July 9th, to an indefinite period because I had not used "reasonable effort" to find employment.

10. On or about August 7, 1972 I filed an appeal but, as of yet, no date has been set.

DELIA TRIANA

I, Margarita Torres, first being duly sworn, do depose and say that:

1. I am fluent in the English and Spanish languages.

2. On this date, I translated the foregoing affidavit from English to Spanish in the presence of the affiant, Delia Triana.

3. The affiant, Delia Triana, indicated to me that she understood this affidavit and affirmed the truth of the matters contained herein.

MARGARITA TORRES

STATE OF CONNECTICUT }
COUNTY OF FAIRFIELD } ss. Bridgeport, September 12, 1972

Personally appeared, Delia Triana, signer and sealer of the foregoing affidavit and Margarita Torres, an interpreter who made oath to the truth of the foregoing matter before me.

JOHN M. CREANE
Commissioner of the Superior Court

Pl. Ex. 32

SUPPLEMENTARY AFFIDAVIT OF DELIA TRIANA

STATE OF CONNECTICUT }
COUNTY OF FAIRFIELD } ss. Bridgeport, October 18, 1972

I, DELIA TRIANA, being duly sworn, depose and say:

1. I am an applicant for intervention in this action and a copy of my first affidavit, dated September 12, 1972, is on file with this Court. My unemployment benefits were terminated without a hearing on or about August 7, 1972 at Bridgeport office and I appealed this decision.

2. To this date I have not received a hearing before the Unemployment Commissioner, more than two months from the date of my appeal.

3. I recently received notice that my appeal was scheduled at 3:20 P.M. on October 17, 1972 before the Unemployment Commissioner in Bridgeport. Mr. Primitivo Comacho and Mr. Juan Miranda received a notice scheduling their appeals for the same date, time and place.

4. We went to the hearing with our attorney, Mr. Creane, but there was not time for my hearing to be started because of the fact that our three hearings were scheduled at the same hour, 3:20 P.M. and the fact that the Unemployment Department representative, Mr. Blair, left at 4:20 P.M. The Commissioner asked Mr. Blair if he could stay to finish all three hearings but Mr. Blair said he would not as he would not be paid overtime.

5. Mr. Miranda's hearing was completed but the Commissioner told me that my hearing would have to be re-scheduled for a later date in October.

6. I found work at Lorraine's in Bridgeport after not receiving unemployment benefits for more than a month but I was laid off again on October 7, 1972.

7. I again went to the Unemployment office on October 10, 1972 in Bridgeport to file a new claim but I was told my records are in Hartford.

8. I have another appointment at the Bridgeport Unemployment Office on October 30th and I am making every effort to find work before then but I am very much afraid that if this Court does not help me I will not get any checks no matter how hard I try to find work. No one at the Unemployment Office tells you what to do to get your benefits. They just let you talk for a few seconds and then say "No checks. You'll get a letter in the mail. Good-day". Once any worker disqualifies you, every other worker will do the same thing to you when you come in at a later date.

9. This affidavit has been prepared with the assistance of my attorney and an interpreter and accurately reflects my experience and opinions.

DELIA TRIANA

Subscribed and sworn to before me this 18th day of October, 1972.

JOHN M. CREANE
Commissioner of Superior Court

Pl. Ex. 32

AFFIDAVIT

I, JUAN MIRANDA, being duly sworn, depose and say:

1. I am 37 years old and reside with my wife and two children at 749 Hallett Street, Bridgeport, Connecticut. My social security number is 581-64-7882.

2. In June, 1972 I lost my job because the Felix Brass Company, 46 Brookfield Avenue, Bridgeport, closed permanently.

3. Immediately thereafter I applied for unemployment compensation benefits at the Bridgeport district office at 67 Washington Avenue.

4. I was receiving $72.00 per week as compensation until the end of August, 1972 when my checks were withheld because I allegedly was not making enough effort to find work.

5. I speak and read very little English. At no time was any explanation given to me either in Spanish or English by anyone at the unemployment office as to what my responsibilities were in making efforts to find work.

6. The Bridgeport office did not give me notice and an opportunity for a hearing before cutting off my benefits. I was notified that my benefits were stopped after speaking with an employee of the department on August 30, 1972.

7. I was told that I had not visited enough prospective employers and was not given a chance to rebut this allegation.

8. Unemployment compensation benefits are the only source of income for my family at the present time.

9. I have made a diligent effort to find work, but as of the date of this affidavit I have not received any unemployment benefits since being cut-off on August 30.

10. I have lost all of the benefits due me for this period because I was never informed what my obligations were and was not given a prior hearing.

11. At no time did I speak with any Spanish speaking employee of the department or receive any written communication from them in Spanish.

12. I believe the entire unemployment compensation procedure is unfair and discriminates against those, like myself, who have trouble understanding the English language.

13. This affidavit has been prepared in cooperation with my attorney and an interpreter and accurately reflects my experiences and opinions.

STATE OF CONNECTICUT }
COUNTY OF FAIRFIELD } ss. Bridgeport September 6, 1972

JUAN MIRANDA

Personally appeared Juan Miranda, signer of the foregoing affidavit, who swore to the truth of the above before me.

DONALD H. TAMIS
Commissioner of the Superior Court

Pl. Ex. 32

SUPPLEMENTARY AFFIDAVIT OF JUAN MIRANDA

STATE OF CONNECTICUT }
COUNTY OF FAIRFIELD } ss. Bridgeport, October 18, 1972

I, JUAN MIRANDA, being duly sworn, depose and say:

1. My unemployment benefits were terminated effective August 13, 1972 as more fully explained in my previous affidavit in this case, dated September 6, 1972. I appealed this decision and my appeal was heard before the Unemployment Commissioner on October 17, 1972. I have no idea when a decision will be rendered.

2. I have been without income for myself and my family since my unemployment benefits were terminated in August. I have no present means of supporting my family, other than handouts from other people. I am unable to pay my rent and I am unable to buy enough food for my family. I have tried to find work everywhere but the jobs are not there.

3. Each two weeks since my benefits were terminated I have gone to the Unemployment Office and showed a fully completed form UC-45, showing the places I had looked for work during the two weeks. Each time the worker barely looks at the card and tells me I get no checks. Sometimes the worker simply tells me to wait until my initial appeal is heard. On October 11, 1972 as I testified at my appeal hearing on October 17, the worker would not even take my written statement as to my efforts to find work.

4. The appeal hearing on October 17, was the first time I could tell my story and have someone listen but I don't know when he will decide my case because he said he is a very busy man with many cases. Even if I get my back benefits I know that I will never be treated fairly by the workers at the Unemployment Office on Washington Avenue and they will stop my checks again right away.

5. This affidavit has been prepared with the assistance of my attorney and a translator and accurately reflects my experience and opinions.

JUAN MIRANDA

Subscribed and sworn to before me this 18th day of October, 1972.

JOHN M. CREANE
Commissioner of Superior Court

Def. Ex. A

AFFIDAVIT

STATE OF CONNECTICUT }
COUNTY OF HARTFORD } ss Wethersfield, Conn. October 17, 1972

I, Carl D. Eisenman, being first duly sworn according to Law, state the following:

1. I am the Executive Director of the Employment Security Division of the Connecticut State Labor Department, and as such, I am familiar with the laws and regulations concerning the adminisration of the Unemployment Compensation Law. Pursuant to State Law, (Sec. 31-237 G.S. Conn.) I administer the law subject to the supervision of the State Labor Commissioner.

2. I am also familiar with the federal laws concerning unemployment compensation with which Connecticut laws must conform if Connecticut is to receive the federal funds necessary to administer the unemployment compensation program.

3. I am also familiar with federal directives in the form of policy letters, especially those concerning the type of hearing to be given claimants whose eligibility for benefits has already been determined, but who are subject to termination of benefits for one reason or another.

4. On or about November 23, 1971, I received Unemployment Insurance Policy Letter No. 1145, dated November 12, 1971, which contained an attachment entitled "Procedures for Implementing the *Java* Decision Requirements." On page 14 of this attachment, Section VI A states:

> *"Issues Arising During a Claim Series*
>
> When an issue arises during a claim series and the claimant is the only interested party, no substantive changes from existing procedures are required. A typical situation would involve a claimant who, during his regular interview, reports an illness during the week being claimed that might warrant denial of benefits for the week. All necessary actions can be taken on the spot, and the claimant may be informed of the issues and of his right

to hearing. Fact-finding can then take place, and a determination can be made.

When an issue arising during the claim series involves any interested party in addition to the claimant, notice and an opportunity to be heard must be given to such other party. The determination of the issues may not be made until such notice and opportunity has been provided. Such determination will be considered on time within the meaning of the Court's requirement for promptness if issued no later than the end of the week following the week in which the issue arises."

5. On or about June 22, 1972, I received Unemployment Insurance Policy Letter No. 1189, dated June 7, 1972, which concerned the *Torres and Dinger* Decisions by the U.S. Supreme Court. On page 2 of said letter, it is stated that "The decisions in *Torres and Dinger* support the position the Manpower Administration has taken that informal predetermination procedures are sufficient and that there need not be a "due process" hearing before a determination or redetermination suspending or terminating benefits."

6. It is and has been the policy of the Unemployment Compensation Department, statewide, to provide informal hearings pursuant to the U.S. Department of Labor directives and the requirements of the *Java* decision in those cases where benefits are terminated, suspended, or reduced. In such cases where another interested party is involved such a hearing is held, but only after the interested party also has notice and is given an opportunity to attend.

7. Eligibility for benefits is determined on a weekly basis, pursuant to statute and case law, even though the reporting for interviews and pickup of checks may be done bi-weekly. Thus, a claimant could be determined ineligible for benefits one week, thus not receiving his check, and then be determined eligible the following week, receiving his check for that week.

CARL D. EISENMAN
Executive Director

Subscribed and sworn to before me this 17th day of October, 1972.

Commissioner of the Superior Court

Def. Ex. B

UNEMPLOYMENT COMPENSATION DEPARTMENT

STATE OF CONNECTICUT

LABOR DEPARTMENT – EMPLOYMENT SECURITY DIVISION

AFFIDAVIT

I, Petra Collazo, being first duly sworn according to Law, state the following:

1. I am an Employment Security Aide II, working in the Bridgeport office of the State Unemployment Compensation Dept.

2. I speak Spanish fluently and part of my duties include acting as interpreter for various claimants who file for benefits in this office.

3. On June 27, 1972 and on August 8, 1972, I gave complete Benefit Rights Interviews to Delia Triana, SS#048-48-0259. That is, I fully explained to her, in Spanish, her rights and obligations concerning her collection of benefits.

4. On July 24, 1972, I interpreted for Delia Triana during her regularly scheduled interview. The information she gave then was apparently the basis for her disqualification.

Dated at Bridgeport, Connecticut, this 13th day of 1972

/s/ Petra Collazo

Subscribed and Sworn to before me, Donald E. Wasik, the undersigned officer.

/s/ Donald E. Wasik
Donald E. Wasik
Commissioner of Superior Court

DEW/b

STATE OF CONNECTICUT

ROBERT K. KILLIAN
ATTORNEY GENERAL

ATTORNEY GENERAL'S OFFICE
HARTFORD, CONNECTICUT 06115

MAILING ADDRESS
EMPLOYMENT SECURITY DIVISION (AS-T)
TEL: (203) 566-3050

May 18, 1973

The Honorable J. Joseph Smith
The Honorable M. Joseph Blumenfeld
The Honorable Jon O. Newman
United States Courthouse
450 Main Street
Hartford, Connecticut 06103

Re: Larry Steinberg, et al vs. Jack A. Fusari, Commissioner of Labor, The Administrator, Unemployment Compensation Act. Civil Action No. 14,104.

Your Honors:

This letter is to notify you of a new position which my client, the defendant Administrator in the above-named case, is now taking with regard to the plaintiff Cecil Paskewitz. Hopefully, this will eliminate some of your work in going over the massive amount of material in this file.

As you know, the factual circumstances regarding Mr. Paskewitz's claim are different from those of the other three named plaintiffs. While these three were given an informal hearing concerning a non-monetary determination, namely eligibility, Mr. Paskewitz was given no hearing at all. No hearing was given because the issue was a monetary one only; that is, it dealt only with the initial question of entitlement. While this is a relatively automatic determination which is based solely on whether or not the claimant has sufficient wage credits, and is an action which was taken by the defendant as trustee of the unemployment compensation fund which he is obliged to protect, we now recognize that redeterminations are sometimes necessary because of error or misinformation, and that due process would not be given such a claimant unless he were given a hearing.

Accordingly, the defendant now concedes in this case that its former policy in not providing a hearing in such cases may violate the due process clause of the 14th Amendment to the Constitution. It is submitted, however, that the statutes pursuant to which said policy was followed are not unconstitutional. The defendant, therefore, effective immediately is changing its policy so that when such questions arise in the future, unemployment compensation benefits will continue to be paid until a written notice is sent to the claimant notifying him to appear at a place, date, and time certain for a hearing, and advising him of the particular issue raised, and of his right to be represented by counsel.

Counsel for the plaintiffs have already been notified by telephone of our change of position, and a carbon copy of this letter is being sent to both Attorneys Creane and Kelley. In addition, we will attempt to draft a consent order to be filed with our brief for the Court to consider in rendering its decision.

I believe it imperative to advise the Court that although this claimant's rights may have been violated because benefits were terminated without a hearing, the Court should be mindful of the fact that Mr. Paskewitz nevertheless received 26 weeks of payments to which he was not legally entitled. As of this writing, it appears certain that no attempt will be made to recoup this overpayment. Thus, this claimant has received and will be able to keep $2,782.00 in benefits (including dependency allowance). It would appear, therefore, that this is a deminimus violation.

Your indulgence in this unusual presentation of this material will be greatly appreciated.

Respectfully submitted,

Robert K. Killian
Attorney General

By: Donald E. Wasik
Assistant Attorney General

DEW:msd
cc: John M. Creane, Esq.
Raymond J. Kelley
Sylvester Markowski, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

(Title Omitted in Printing)

ATTACHMENT I

Proposed Consent Order

As part of any order which the Court may enter in rendering its decision in this case, the following is a proposed order which the Court may wish to consider.

"The defendant Administrator is hereby ordered to put into effect at once, if it has not already done so, the following policy: Whenever the defendant has reason to believe that a redetermination must be made either as to the question of entitlement itself or as to any change affecting the amount of unemployment compensation benefits, then before such a change can become effective, written notice of a hearing at a place, date and time certain must be sent to the claimant at his last known mailing address, said notice apprising the claimant of the issue or issues to be raised at said hearing, and advising him that he may be represented by counsel at said hearing, and a written notice of the decision after said hearing must be mailed to the claimant."

DEFENDANT

By: ROBERT K. KILLIAN
Attorney General

DONALD E. WASIK
Assistant Attorney General

(Certification Omitted in Printing)

AFFIDAVIT

STATE OF CONNECTICUT }
COUNTY OF HARTFORD } ss Wethersfield, Conn. June 5, 1973

I, Theodore W. Hatcher, being duly sworn according to Law, state the following:

1. I am the Director of the Unemployment Compensation Department of the Employment Security Division of the Connecticut Labor Department, and as such, I am familiar with the laws and regulations, policies, and procedures concerning the administration of the Unemployment Compensation Law.

2. I am also familiar with the Department's procedures when a local office receives a route slip from the Employment Service Office indicating that a claimant has refused a referral to a suitable job or has refused a suitable job which was offered. In such cases, a notice is sent to the claimant, unless he is scheduled to appear within two days, said notice scheduling a hearing for a date and time certain and advising claimant of the reason for the hearing and that he can bring witnesses and be represented at said hearing. If the notice is not sent because the claimant is due to appear within two days, he is advised when he reports that he can have a hearing then or he can wait approximately five days. If a claimant asks for a later hearing and asks for his check in the meantime, a hearing is scheduled and he is given his check unless he has already given the examiner facts which would definitely disqualify him, i.e., he was in the hospital the last two weeks or was on a fishing trip for two weeks, etc.

If the information concerning the refusal of a suitable job comes from a prospective employer who is an interested party (one whose merit rating account has been charged because of the termination of the claimant's employment), a notice of the hearing is also sent to said employer.

THEODORE W. HATCHER, *Director*
Unemployment Compensation Department

Subscribed and sworn to before me this 5th day of June, 1973.

Commissioner of the Superior Court

UNITED STATES DISTRICT

DISTRICT OF CONNECTICUT

- - - -

JUDGE SMITH: Who is going to argue?

MR. CREANE: We have numerous stipulations, and a stipulation to an index of exhibits, which I believe your Honors have a copy of the list of exhibits, Plaintiffs' Exhibits, in your file, and there is a stipulation that -- as to the admissibility of all of the exhibits.

There was about a fourteen page stipulation as to facts which was mailed last week, but unfortunately went to Hartford and New Haven, but it is here today, but apparently no one has had an opportunity to review it ye t.

There is also an -- several additional stipulations and rather than putting the parties on to give live testimony, the parties have stipulated that previous affidavits which are on file with the Court may be made a part of this record at this hearing for all of the four named plaintiffs.

JUDGE SMITH: They may be received. How far do your exhibits go so far?

MR. CREANE: The stipulation is as to numbers, 1 through 30, your Honor. Included in that are numberous reports that are submitted to the Department of Labor, several depositions that were taken by the plaintiffs. We have a stipulation --

JUDGE BLUMENFELD: In this manilla folder --

MR. CREANE: They were all marked last Friday,

your Honor, and hopefully everything is in order. They were marked in the clerk's office.

JUDGE SMITH: Are these affidavits in addition to those?

MR. CREANE: They are in addition.

JUDGE SMITH: Mark them with 31.

MR. CREANE: Thirty-one is an additional exhibit, but Mr. Wasik wants to object to the relevancy of it, not to its authenticity but to its relevancy.

What it does is provide a breakdown on the time delay between the time a person files an appeal before the Unemployment Commissioner and the date he gets a written decision.

One of our earlier exhibits, I believe it is number 4, one of the forms that is submitted to the Department of Labor, the breakdown is up to 75 days and over. This is one of the facts that has been discussed in all of the litigation involving the issue before the Court as to how much of a time delay there is between the time you get some type of hearing at the local office and if you process a hearing before the Commissioner.

The period of delay has been considered relevant by all the Courts.

JUDGE SMITH: Is this the mean time over a certain period?

MR. CREANE: Yes, the time between the claimant's benefits are terminated, files an appeal and gets a written decision from the Commissioner after having its hearing.

JUDGE BLUMENFELD: Based on what, on examination of the records?

MR. CREANE: Yes. The Department, in Exhibit 4, breaks it down by up to 75 days and over. That is the final category on information submitted to the Department of Labor.

At the deposition of the Commissioner we asked him to supply a further breakdown on the above 75 days. He did it for one of the districts, and in order to save him time--

JUDGE BLUMENFELD: You need longer than 75 days to make your point.

MR. CREANE: We have it broken down to 150 days and over. There is no question as to the authenticity of the figures but Mr. Wasik apparently has an objection to the relevancy of the breakdown, on 31.

JUDGE SMITH: Mark it 31 for identification.

(Document marked Plaintiffs' Exhibit 31 for identification.)

MR. WASIK: Does the Court wish to hear argument?

JUDGE SMITH: Yes.

MR. WASIK: It is the defendant's position, your Honor, that happens after the hearing is not relevant as to the type of hearing that is given to the claimants at the administrative level. This is the crux of the plaintiffs' complaint, the type of hearing that they are given.

They claim that it is not " due process" type of hearing as required by Goldberg vs Kelly, so the delay after that hearing the defendants submitted is not relevent to the type of hearing that is given.

The appeal, when it is taken, goes to an unemployment compensation commissioner who is a member of the Unemployment Commission, which is a separate entity, apart from the Unemployment Department, which is the -- which the Commissioner is administrator of.

For those reasons we feel it is not relevent to the issue at hand.

JUDGE SMITH: It may be marked as a full exhibit. The objection is overruled.

MR. WASIK: Will the Court note an exception?

JUDGE SMITH: Exceptions are not necessary in our practice.

(Plaintiff's Exhibit 31 received in evidence.)

JUDGE BLUMENFELD: Your affidavits, are you stipulating that the witnesses would say what their affidavits say or that the facts in the affidavit are true?

MR. CREANE: The witnesses would say what is in the affidavits, your Honor.

MR. WASIK: The defendants at prior hearings submitted an affidavit of the Executive Director of the Department, Carl Eisenman; also an affidavit of one Petra Colaso, an interpreter, one who acted as interpreter in the Bridgeport office.

I believe these were marked as exhibits, I don't have the numbers, at the prior hearing, and I would offer them now.

JUDGE BLUMENFELD: How many?

MR. WASIK: Just two. One affidavit for each.

JUDGE SMITH: Let them be marked as Defendants' Exhibits A and B. We have not yet got those other affidavits marked. Start with 32. How many are there?

MR. CREANE: There were several affidavits for some of the plaintiffs. I suppose they could be 32 A and B, 33A andB.

JUDGE BLUMENFELD: Do we have to be held up while they are marked?

MR. CREANE: No, your Honor. If the Court would wish we could do that after the hearing.

JUDGE SMITH: Proceed with your argument.

MR. CREANE: One final stipulation, that the depositions which are already marked as exhibits, one of the

managers of the Bridgeport Unemployment Office and one of the Chairman of the Unemployment Compensation Commission reflecting department policy, so that they are in as exhibits, and there is a stipulation that they reflect the defendants' State policy.

JUDGE SMITH: It may be filed.

MR. CREANE: This suit seeks to establish for unemployment compensation recipients who have survived the initial eligibility determination by the defendant of the protection of the Goldberg vs. Kelly due process prior hearing.

It is our policy -- it is our position that the due process clause of the Fourteenth Amendment and the language of Section 2 of the Social Security Act require this hearing.

We are going to asking for time to file briefs after the hearing today, your Honor, and I won't take up much more time with legal argument at this point unless the Court has some questions. We apparently would need at lease three weeks on briefs. Mr. Wasik had made plans to be out of the State during the latter part of the month and we would have no objection if theCourt would grant us until June 5 to file briefs on this case. There is a great deal of data reports, depositions and other forms of material that the parties are going to have to sift through and present in the best form for the Court.

JUDGE SMITH: Do you wish to exchange briefs on the fifth of June or briefs first for the plaintiffs and then an answering brief for the defendants?

MR. CREANE: We would prefer simultaneous briefs. If anything, Mr. Wasik is more aware of what our arguments are than we are of what he may be raising in the way of defenses.

JUDGE SMITH: Exchange briefs by June 5.

MR. CREANE: I must say a word about the exhibits before the Court. I realize it is very awkward, but what we have had to do is submit individual policy memos and policy letters as exhibits because Connecticut is one of the few states that does not have a unified manual of regulations, such as was before the Court in Indiana, New York, California, where the defendant, or the state's regulations were all set out.

They are rather scattered through a number of volumes here in Connecticut so that accounts for some of the awkward mass of material before the Court on the exhibits.

We have just one witness that we are going to be calling. Mr. Hatcher.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

LARRY STEINBERG and CECIL PASKEWITZ, et al., and DELIA TRIANA and JUAN MIRANDA,

Intervenors,

vs.

JACK A. FUSARI, Commissioner of Labor, The Administrator, the Unemployment Compensation Act, State of Connecticut.

15,104 Civil

Hartford, Connecticut
May 14, 1973

B e f o r e:

Hon. J. JOSEPH SMITH, U.S.C.J.
Hon. M. JOSEPH BLUMENFELD, U.S.D.J.
Hon. JON O. NEWMAN, U.S.D.J.

[2]

Appearances:

For the Plaintiffs:

JOHN M. CREANE
412 East Main Street
Bridgeport, Connecticut

For the Defendants:

ROBERT K. KILLIAN
Attorney General
By: DONALD E. WASIK, Esq., of Counsel
Assistant Attorney General
Employment Security Div. AG-7
Labor Department
Hartford, Connecticut

Hatcher - direct [3]

THEODORE W. HATCHER, called as a witness, having first been duly sworn by the Clerk of the Court, was examined and testified as follows:

THE CLERK: State your name and address, please?

THE WITNESS: Theodore W. Hatcher. I live at 38 Bronson Street, Waterbury, Connecticut.

DIRECT EXAMINATION

BY MR. CREANE:

Q Mr. Hatcher, you are presently working for the Connecticut Department of Labor, are you not?

A Yes.

Q In what capacity?

A I'm the Unemployment Compensation Director.

Q In that capacity you have become familiar with the Connecticut laws and regulations on unemployment compensation and on the relevant provision of the Social Security Act as they affect your program here in Connecticut?

A Yes.

Q When a claimant for unemployment compensation applies in Connecticut, he is not required to demonstrate the financial need at the time he applies, is he?

A No, he is not.

Q However, you do allow a dependency allowance, do you not, for eligible claimants, $5.00 per dependent?

A Yes.

Q Does that in any sense reflect a recognition of need of claimants with larger families?

A No, because people, or a claimant, regardless of his financial status, can qualify for benefits in dependency allowances without establishing need as long as he is the whole or main support of that dependent, he may qualify for benefits.

Q I understand that, the dependency is given to everyone, but doesn't it reflect a recognition that larger families with a man or woman out of work are perhaps in more need of unemployment benefits or large amounts of benefits?

A Yes, it does.

Q Isn't it true that when the Social Security Act was enacted in 1935, including the provision on the unemployment compensation section that the -- that that expressed a congressional recognition of financial need for workers who have been laid off from work through no fault of their own and are seeking work?

A Do I have to answer yes or no?

JUDGE BLUMENFELD: Do the best you can.

JUDGE SMITH: Try.

A Unemployment compensation was initiated to provide the unemployed individual with a subsistance wage during the period that they were unemployed. In order also not to delve into their

savings or other benefits that they may have set up on their own.

Q So as to provide a short-run financial subsistance for workers who have lost their jobs?

A That's right.

JUDGE SMITH: Does the witness have any particular competence to say what was in the mind of the Congress in 1935?

MR. CREANE: I don't think he would be qualified as an expert, but he does administer the Act and he has to be familiar with -- he has to operate the agency in accordance with the Act, and I think he probably is aware of what reports and so on that came out at the time that the Social Security Act was enacted.

JUDGE SMITH: Wouldn't the reports be a little more sounder foundation for us?

MR. CREANE: Yes, they would be better evidence, your Honor.

Q Mr. Hatcher, if you can answer this, please do. If you can't, you don't have to. Isn't it true that there are substantial number of unemployment compensation recipients in Connecticut who depend solely on unemployment compensation benefits to provide for the needs for themselves and their families?

MR. WASIK: Objection. I don't think the witness

is qualified to answer that. He doesn't know from his own knowledge whether this is true or not.

MR. CREANE: I asked if he knew from his own experience and knowledge. If he doesn't, he can --

JUDGE BLUMENFELD: Was it part of his duties to find out, does he keep any records with respect to that?

MR. CREANE: I think perhaps they do keep records that have a bearing on that.

JUDGE BLUMENFELD: Do you?

THE WITNESS: No, we do not. We do not question any individual on the basis of need or ability to get along with or without the funds of unemployment compensation.

Q You have never done a study for your department to try to ascertain that?

A No.

Q After a claimant has applied for unemployment benefits and has been determined eligible, he is assigned a biweekly schedule, is he not, for reporting to the local office?

A I think I must answer this way; that the first thing that's established is entitlement and not eligibility. The individual's benefits that he establishes on filing a new claim establishes his entitlement. That's to say that this individual has a certain weekly rate and a certain durational

amount, should he be otherwise eligible.

Q I am talking about -- you are familiar with the term "seated interview", are you not?

A Yes.

Q When a claimant who has been found to be entitled or his entitlement has been established and he begins receiving benefits, when he comes into the local office and a question arises as to his eligibility or entitlement for benefits in that two-week period, he is generally referred for a seated interview, is he not?

A The initial determination, once it's established he has entitlement, generally speaking, that benefits rights interview is given to him in a seated interview.

Q I'm sorry, what was the last part of that answer?

A Benefits rights interview --

Q The benefit rights interview comes before the question arises as to his continued eligibility, does it, ordinarily?

A There has to be a monetary determination first to determine that the individual is, in fact, entitled. If he is not entitled, then there is no question of eligibility that has to be resolved prior to the --

Q This suit is not concerned with any questions arising out of that determination of entitlement or whether it's a valid

initiating claim. What I would like to focus on, when questions on a continued claim come up at a seated interview --

A Yes, questions of eligibility.

Q -- on a continued claim basis --

A Yes.

Q -- not on the initial question of eligibility and entitlement --

A Yes.

Q Now, what types of issues can get or dequalifications can result in a finding of -- that a claimant is not going to get their benefits during a particular two-week period?

A An individual -- there are quite a number. An individual may be ineligible for reasons of his separation from employment. He may also be ineligible --

Q I'm not sure we are -- we are not really talking about the same things. I'm not talking about the initial determination of eligibility. When the worker comes in and you resolve the questions whether he left work voluntarily or he was dismissed about misconduct, we are not talking about those initial determinations.

Are you familiar with the form that your department submits, No. ES-207?

A Yes.

MR. CREANE: That's one of the plaintiff's

exhibits. Perhaps, if you don't have any objection, I can refresh his recollection what we are talking about.

JUDGE BLUMENFELD: Is that termination of benefits?

MR. CREANE: Yes, your Honor. Not on the initial eligibility, but on a termination after a claimant has been determined eligible and begun receiving benefits. There are really two -- it's set out in the stipulation.

JUDGE SMITH: Aren't their cases where information comes to the Department after a finding of entitlement after benefits start which casts some doubt as to whether the entitlement was properly found, wouldn't that be included in these?

MR. CREANE: No, that's not the type of issue we are talking about. If you have the exhibits in front of you, if you would look at No. 404 BS-207, I think it breaks it down so that --

JUDGE BLUMENFELD: Is there a title on that exhibit that you have in your hand?

MR. CREANE: Non-monetary Determination Activities.

JUDGE BLUMENFELD: In short, that means what?

THE WITNESS: These are the issues that arise that may result in claimant ineligibility once adjudicated.

BY MR. CREANE:

Q In part, on the first part here, we are talking about determinations involving separation issues?

A Yes.

Q Those are the issues, are they not, that come up when a worker first goes to the unemployment office, there has to be a determination whether he left work voluntarily, whether he was dismissed for misconduct or whether he was attending school full-time and, therefore, not eligible for benefits?

A All of which can also occur on a continuing claim basis and individual may go to work for a short time and those may also be issues on a continuing claim.

Q Dismissal for misconduct?

A Yes.

Q Voluntarily leaving a job?

A That's right. An individual may go to work for an extremely short period of time, one or two days, and still be filing partial benefits in a continuing claim series, and those issues may also arise at that time.

JUDGE BLUMENFELD: You mean with respect to his second job?

THE WITNESS: Yes, to a second job.

JUDGE BLUMENFELD: You don't mean reopening the determination on the first?

THE WITNESS: No, it would not affect --

JUDGE BLUMENFELD: The finding of eligiblity?

THE WITNESS: That's right.

Q The issue that I am interested in involve determinations involving other issues.

A Yes, the work refusal, failure to apply --

Q Available for work?

A Available and able, yes.

Q This is the report for December, 1972, and apparently the bulk of the denials on continuing claim is for -- under the issue of able, available and actively seeking work?

A Yes.

Q 1339 out of 1900 denials?

A Yes.

Q For example, under pregnancy, the question of whether the claimant should be disqualified as being too pregnant?

A Yes.

Q 267 on disqualifying or deductibility income?

A Yes.

Q 213 on refusal, suitable work?

A Correct.

Q And 38 miscellaneous?

A That's right.

JUDGE SMITH: Which one is that? That's not the

first page, Exhibit 4.

MR. CREANE: It has a report period, your Honor. This one is 12/31/72. They should be arranged chronologically. What's the top one in your exhibit?

JUDGE SMITH: This is 2/13/73.

MR. CREANE: It would be back about two reports earlier than that. Any report would give you an idea of the distinction between the initial eligibility questions and the continuing eligibility questions.

Q Now, on the question of determination after a seated interview, isn't it normal procedure that the claimant will come in, get into the claims line, submit two signed cards, UC-46 and UC-46, in which he lists the efforts he has made to obtain work during the two-week period, and signed a card stating that he has not had other employment, that he has not been collecting any other unemployment benefits and present those in the claims line?

A Yes.

Q Now, if a question arises in the mind of the person giving out the checks as to possible ineligibility, he would be ordinarily referred to the seated interview line?

A That's correct.

Q When he gets to the head of the seated interview line, he will sit down with what the Department calls a fact finder,

isn't that correct?

A That's correct.

Q For what they term a seated interview?

A Yes.

Q Now, at the seated interview there is a determination made as to whether the claimant is eligible for that two-week period or whether he should be disqualified for that two-week period, isn't that correct?

A Yes.

Q Isn't it true that at the seated interviews, which is really the heart of this case, that the fact finder in reaching a decision under some circumstances will rely on third party information, which is given either over the phone or in writing, and not directly there at the seated interview?

A In some cases, yes.

Q Isn't it true that at the seated interviews there are contested factual issues which the claims examiner must sort out and make a decision on?

A That he must resolve, yes.

Q Isn't it true that at the seated interviews it very often involves the application of a very broad, in fact, vague standard, such as available for work, reasonable efforts to make work, job that was suitable as defined in the statute, whether the job offered involved a place that was a reasonable distance

from his home, isn't the fact finder very often asked to apply those particular standards to the facts of the case before him?

A I must qualify part of my answer because you refer to vague statute.

Q I call it broad. I will withdrawn the term "vague".

A Broad. They have to apply broad standards, yes.

Q Isn't it true --

JUDGE NEWMAN: Is the interview you are talking about with respect to the next two weeks or the last two weeks, or is it in the middle, when does it happen with reference --

THE WITNESS: The individual, when he files a claim with benefits, a continuing claim for benefits, files for a period that ends the Saturday before the week in which he is appearing. He is at that time certifying to his availability and eligibility for that two-week period immediately preceding, and these are the claims that are at issue at this interview.

JUDGE BLUMENFELD: Immediately preceding?

THE WITNESS: Yes.

JUDGE BLUMENFELD: You mean that have already passed?

THE WITNESS: That have already passed.

JUDGE SMITH: He doesn't get paid until after the two-week period until after he has had the interview following the end of the two-week period?

THE WITNESS: Yes. He is certifying to his eligibility for the benefit period or the claim period which ends the Saturday before he comes in. At that time he is certifying that he has been available for work and he has applied for work.

JUDGE BLUMENFELD: During the past two weeks?

THE WITNESS: During the past two weeks.

JUDGE BLUMENFELD: He goes on Monday and says, "I want my benefits for the past two weeks"?

THE WITNESS:

JUDGE NEWMAN: If they don't question it, he gets paid that day?

THE WITNESS: That's right.

JUDGE NEWMAN: If they question it, then he has this -- what's been called a seated interview?

THE WITNESS: Which would occur that same day, and if otherwise eligible, would be paid, but if denied, no.

JUDGE NEWMAN: Would the issue get resolved at least at that level that day?

THE WITNESS: Generally speaking. There are cases

in which there is a limited delay, but generally, there is a finding on the day in question.

MR. CREANE: Your Honor, the stipulation states that in some circumstances a fact finding is made, and then the decision is mailed out under the signature of the office manager in a form letter at a later point.

BY MR. CREANE:

Q Ordinarily, you said whatever develops at the seated interview is for the past two-week period?

A Yes.

Q Isn't it true that there is at least one circumstance where a decision is made on the day of the claimant is scheduled to come in that will affect his benefits for the coming two weeks and not for the past two weeks? I'm referring to what is our Exhibit 29, evidences of temporary unavailability. Are you familiar with that?

A There is no determination made at that time, at the time of the interview. The individual is interviewed on the issue that is occurring on that day.

Q Isn't it stated here that if the fact finder determines that the man has been drinking, that determination will be made that he was not available for that week?

A For that particular week, not the weeks coming. This

is the week in which --

Q It says since the observed condition does not relate to the work for which the claimant is filing his claim, the fact finding report should be held until the claimant files his claim for the week in which he appeared in the local office because there is some time lag. You come in on a Tuesday from the preceding two-week period?

A Yes.

Q That Tuesday of that week you already knew the first week of your next two-week period?

A That's correct.

Q So that if the fact finder observes a man and feels that he is under the influence of alcohol, he will disqualify him, make a note, and disqualify him for that week the next time he comes in?

A Yes, but he is being interviewed at that time on the issue.

Q Of whether he is under the influence of alcohol?

A That's right.

JUDGE BLUMENFELD: What does he do? Does he say, "Forget it, you behaved yourself the last two weeks, but for this week you are in trouble because you are drunk"?

THE WITNESS: The issue of availability -- an

individual must be found to be available for work throughout the week for which he is receiving benefits, and since this issue of inebriation occurs during the current week and not for any week for which he is being paid benefits today, then it does not become an issue until the individual actually files a claim for the current week.

JUDGE NEWMAN: When he files that claim is some notation made as to what the facts were when he came in before?

THE WITNESS: Yes. It is necessary to interview him at the time he is in in order to obtain the facts on this particular week.

JUDGE NEWMAN: Are you saying that as to those issues that are observable when a claimant comes in the seated interview serves two purposes?

THE WITNESS: Yes.

JUDGE NEWMAN: It determines past eligibility, eligibility for the preceding two weeks?

THE WITNESS: That's correct.

JUDGE NEWMAN: And it serves as a factual basis for the determination that will later be made as to the two-week period in which the interview is held?

THE WITNESS: I can't say the two-week period, but

the current week. The past two weeks and the current week because we cannot project into the future.

JUDGE BLUMENFELD: Do you carry it back into the past? He is in there on the 15th, let's say the 17th of the month, a Monday, and he is looking for his benefits for the two first weeks of the month, and he is in an intoxiciated condition, and now you say that you take that into account in determining whether he was going to get benefits for the first two weeks?

THE WITNESS: No.

JUDGE BLUMENFELD: That's out?

THE WITNESS: Yes.

JUDGE BLUMENFELD: He is in to collect for those?

THE WITNESS: That's correct.

JUDGE BLUMENFELD: But while he is in there, you notice he is in no shape to go to work that day?

THE WITNESS: That's right, that week.

JUDGE BLUMENFELD: So you cross that week off, he is not entitled to benefits for that week, is that right?

THE WITNESS: If it's found that he is in a condition such that he cannot be referred to a job potential that day.

JUDGE BLUMENFELD: So he loses his benefits

for that week?

THE WITNESS: Yes.

BY MR. CREANE:

Q Do you have your fact finders -- do they receive any particular training in recognizing the difference between a man who is drunk or a man who might be having a mild seizure or been taking pills under doctor's orders or taking sedatives who would give the appearance --

A This is the purpose of the interview. If the individual has a medical problem and he presents the medical problem and we are able to substantiate it with a medical statement, then the man has no problem in that area.

Q I think you stated that very often the fact finder will have to make a judgment as to whether they think the person is lying or telling the truth, isn't that right?

A Well, there are times where we must resolve the facts we are unable to confirm.

Q Aren't they told that in the comments section of the fact finding report when they write up the fact finding report that they are specifically told to put in that section any nonfactual factors that went into their decision, even though they are not part of the factual record, such as, "I didn't believe the person was telling the truth, or he twitched when I asked him the question," aren't they told to put those kind

of comments in?

A The type of comment that they have to put in there is a justification for having arrived at their decision. There is an occasional period where an individual has established a record such that there is a question on the validity of his statement and this may be evaluated along with the other factors in arriving at a decision.

Q So the fact finding report would have the factual basis for the decision, and then a comment section for any nonfactual matters that went into arriving at his decision?

A It may not have any nonfactual information. It could have some nonfactual.

Q If a claimant is required to register with the employment service -- is he not, as a condition of receiving benefits?

A Yes.

Q And on occasion a job will be -- he will be given a job referral to go for an interview?

A Yes.

Q Now, the employer is given a card that he is to check off if the person shows up to inform the unemployment department of whether or not the person showed up, whether the job was offered, whether it was refused, whether it was not offered because a claimant didn't appear to be interested in the job?

A Yes. The individual hand carries the card and presents it to the employer and the employer makes his comments on the part of the card that's designated for that purpose.

Q Doesn't he generally mail it back?

A He mails it back, yes.

Q Now, suppose a card comes back and it's checked out and, "I have jobs, but I didn't offer one to this claimaint because I didn't think he was interested or he told me he had a problem with transportation," and the man -- and that man comes in for -- to pick up his checks and they refer him over for a seated interview, and isn't it true that the fact finding examiner can give any amount of weight he wants to that unverified report from the third party in making his decision at the seated interview, he might try to call the employer to verify it, isn't that correct?

A Yes, he may.

Q But he may not be able to get hold of the employer?

A Well, any -- there is a policy throughout the Department that on the fact that cannot be established, the claimant is given the benefit of the doubt, so I don't think that the program is weighted towards more -- more heavily towards the employer statement, if we cannot verify it.

Q Is that in writing anywhere, or is that sort of an unwritten policy?

A It's an unwritten policy.

Q But the fact finder is free to rely on third party information in arriving at his decision?

A If the third party is a party at interest, yes.

Q Suppose there is a report that a claimant was working --

JUDGE NEWMAN: What does that mean? You mean if the issue is the circumstances under which he left employment so that it affected that employer's --

THE WITNESS: No, I'm referring to the employer where an individual was referred and the employer either offered a job and the individual refused, or the employer did not offer a job for particular reasons and the employer had a potential job for the individual.

JUDGE BLUMENFELD: That is, a prospective employer?

THE WITNESS: Yes.

JUDGE NEWMAN: That's what you mean by a party in interest?

THE WITNESS: Yes.

JUDGE NEWMAN: Inthat event, you say they don't rely on the written statement?

THE WITNESS: Not alone, not alone. It has -- the individual has to be interviewed on the job for refusal. He cannot be denied on the job if he

refuses.

JUDGE BLUMENFELD: Just on the basis of the card from the proposed employer?

THE WITNESS: That's correct, he cannot, he must be interviewed.

JUDGE NEWMAN: Supposing he disputes what's on the card?

THE WITNESS: Then we attempt to reconcile the differences between the statements. Where there is a question of doubt, unconfirmed doubt, we weigh it in favor of the claimant. We cannot deprive him on the basis of a figment of our imagination.

MR. NEWMAN: Supposing it's a factual dispute, the cards says the employer reports he offered him a job, and the claimant says, "I have no transportation for the time period that he offered me that particular shift"?

THE WITNESS: And if the individual confirms this --

JUDGE NEWMAN: Which individual?

THE WITNESS: The claimant.

JUDGE NEWMAN: That's what the claimant says, he says, "I have no transportation"?

THE WITNESS: So there is no conflict, then, in that particular case. The employer offered him a job,

he said he couldn't accept it because he had no transportation, so there is actually no conflict, he has failed to accept the job.

Now, we must determine whether such reason for refusal was with or without -- whether he refused suitable work without sufficient job -- without sufficient cause, I'm sorry.

JUDGE BLUMENFELD: What about it, do you then look into the question of whether he had transportation?

THE WITNESS: Yes, we do look into that. This is all part of the report.

JUDGE NEWMAN: Supposing it's an absolute conflict, the claimant says, "He never offered me a job"?

THE WITNESS: This type of case you have to dig a little more deeply to find out where the weight of evidence lies in order to make a determination. If the employer -- you could contact the employer and say that this individual says he appeared there, you didn't offer him a job. The employer -- you take additional testimony from the testimony -- you take additional testimony from the employer, and if there is still a conflict and we are unable to reconcile it, we would have to reconcile it in favor of the claimant, but

generally speaking, it doesn't reach the point where the individual or the employer does not eventually agree that something has happened there at that time.

JUDGE BLUMENFELD: There can be misunderstanding?

THE WITNESS: Yes.

JUDGE BLUMENFELD: But rarely a case of direct conflict so that you have to make a judgment of credibility?

THE WITNESS: That's right.

BY MR. CREANE:

Q Aren't there often direct conflicts of version of facts at the hearings before the unemployment commissioners, where the claimant says one thing and Department says: no, it's different?

A Yes, there are.

Q Aren't those merely continuations of the conflicts that arose at the unemployment office and were resolved against the claimant?

A Not always. Sometimes the original statement of the claimant is substantially different from those that appear at the hearings.

Q If the claimant in the situation involving a job referral, if the employer is not there, the fact finder is still empowered to go ahead and make a determination, if he is unable

to contact a third party for additional confirmation, isn't he?

A Not without exhausting all avenues open for obtaining the information from the employer.

Q The employer sends back a card and says, "I offered him a job and he refused," and the claimant says, "He never offered it to me," the fact finder tries to get hold of the employer and is unable to do so, the fact finder is then -- he has to make a decision?

A He has to make a decision. If the employer is unreachable, he has to make a decision on the basis of the facts that's available to him.

Q Suppose he thinks the claimant is lying, he is free to take that into consideration in arriving at his decision?

A He could take that into consideration.

Q This same type of problem would come up on the question of availability and reasonable effort to find work, wouldn't it, where an employer contacted the Department and said, "Look, this guy has been collecting benefits and I had a job waiting for him two months after he left and he never came back to apply for it," wouldn't that involve again the question of third party information of why didn't the man go back and apply, what were the circumstances when he left, was there too much bitterness between them, is that an excusable reasonfor not going back? Doesn't that again involve third party information coming to the

Department?

A Yes.

Q And decisions being made partly on the basis of third party information of persons who were not present at the seated interview?

A Yes.

Q Isn't it true that if the Department receives a report that a claimant has been out working, moonlighting, and hasn't reported that income on his UC-46 form, that he has disqualifying income, isn't it true that the Department, if they consider it a reliable source of information, can use that third party information as a basis for disqualifying the claimant at a seated interview?

A Not as a basis for disqualifying until it was established that he actually had the income. The employer involved, or if there is an employer involved, would have to establish that the individual actually had earnings before there would be a denial of benefits.

Q Are there any other major reasons for disqualifying a claimant on the basis of a seated interview that would not involve the various degrees, factual issues or relying on third party information, not in every single instance, but are there any major categories that you can think of that where you can say that never involves third party information categorically?

A No, except where -- I'm sorry -- except where the individual is unable to work and so states that he is unable to work.

Q A major reason for disqualifying claimants is on the basis they have not used reasonable effort to seek work, isn't that correct?

A Yes.

Q That's one of the big reasons. Isn't that determination by the fact finder at the seated interview, doesn't he have to take into account many, many factors in arriving at an individual decision for that claimant?

A Yes, he does.

Q Could you give a few of the factors they would have to make in order to make that kind of decision?

A Well, the condition of the labor market, the individual's job classification, the claimant's exposure up to this time to the job market, if the individual has already exhausted the job potentials in the area, all of this has to be taken into consideration.

Q Wouldn't such factors as whether he had a car, whether he had full access to a car, how far the jobs that he could do were from his home?

A That's right.

Q So there is really almost an infinite number of

factors that could be relevant to the question of whether a particular claimant had made a reasonable effort to seek work, reasonable for him?

A Yes.

Q Isn't it true that the Department's regulations recognize that, that they recognize it's basically a judgment in each individual case as to whether the person made a reasonable effort?

A Yes.

Q Isn't that a preeminently factual issue, reasonable effort, in any particular situation or whether a particular claimant has made a reasonable effort?

A There is a judgment that must be made.

Q Do you have a working definition of what the statutory requirement of reasonable effort means that you could supply us with?

A A statutory?

Q There is a statutory -- that the claimant make reasonable effort in order to get benefits.

A That the individual do what can be reasonably expected of him to try to find work if he is truly attached to the labor market ready and available for work.

Q You mentioned one of the factors would be the labor market itself. What is the degree of unemployment, whether

there is many jobs available? Do you know if the fact finders are supplied with that information on what the condition of the labor market is?

A The fact finders are aware of the condition of their labor market area through constant exposure to their particular area, they know when employment in their area is heavy, they have available to them from the employment service records the hiring in certain job classifications.

Q Are you sure that's actually followed through, or is that just what you wish policy was?

A No, I'm sure.

Q It's carried through?

A Yes.

Q I ask that because --

JUDGE BLUMENFELD: Is this a hostile witness for you?

MR. CREANE: I'm sorry.

JUDGE BLUMENFELD: Is Mr. Hatcher here a hostile witness, do you regard him as a hostile witness?

MR. CREANE: Not at this point, your Honor.

JUDGE BLUMENFELD: This testimony, does this illustrate what the regulations provide, or is this something we wouldn't have known otherwise? Do we have to have this testimony as to every little step that's

taken there and how it's done?

MR. CREANE: Yes. We have no agreement, your Honor, on -- the State's position has been up to this point the claimant supplies the information and the only reason he is disqualified is because of information that he supplies. You mean the overall testimony of Mr. Hatcher?

JUDGE BLUMENFELD: Yes. Couldn't this have been taken on deposition and reduced to writing so that we could have had it?

MR. CREANE: I suppose it could have been doneby deposition.

JUDGE BLUMENFELD: Up to now he is not a hostile witness and we don't have to be too critical of matters of credibility, is that right?

MR. CREANE: Yes, that's right.

BY MR. CREANE:

Q The claimants supply another form, UC-45, where they list the places that they have sought work?

A Yes.

Q Is there any statewide policy on the number of places that must be listed on that form?

A There is no policy because you have to establish -- as far as eligibility is concerned, we do have a policy for

submitting or screening in order to establish which ones should be interviewed in order to determine whether or not such effort was reasonable, and that is three places a week. If the individual applies at fewer than three, then, they must be interviewed to determine the quality of the effort that they have made.

Q Has that ever been reduced to writing, that there must be at least three, and if there are two, you have to have a seated interview, is that a policy memorandum?

A It's not written that the individuals who are involved are aware of that.

Q You tell them by phone?

A Well, through our training sessions, through our exposures to the adjudication section, through our management meetings that the managers are responsible for the operation of their office.

Q Do you know if --

JUDGE NEWMAN: At least three or less than three, which is the critical point?

THE WITNESS: If they have three, they are screened through, except for a periodic reinterview that's scheduled for each individual.

JUDGE NEWMAN: I don't know what you mean, screened through?

THE WITNESS: The individual who takes the claim has to be faced with making a judgment as to which ones should be referred for further interview and which should not.

JUDGE NEWMAN: If he sees there were three places --

THE WITNESS: Then he has no problem for screening that individual.

JUDGE BLUMENFELD: You mean clearing him for receipt of benefits?

THE WITNESS: Receipt of benefits.

JUDGE NEWMAN: Does he, in fact, pay him?

THE WITNESS: Pay him benefits.

JUDGE NEWMAN: So long as there is three?

THE WITNESS: Unless there is a regular scheduled periodic interview. We schedule interviews to cover the entire question of availability periodically.

JUDGE NEWMAN: How often does that happen?

THE WITNESS: It varies upon individuals, the attachment to the labor market and other factors that are involved there.

JUDGE BLUMENFELD: When do you set up that schedule?

THE WITNESS: We set up that schedule on thefirst interview, yes.

JUDGE NEWMAN: Is the claimant ever told that three is the magic number?

THE WITNESS: Yes.

JUDGE NEWMAN: When does he find that out?

THE WITNESS: He is told that on his benefit rights interview. He is told that when he is handed the work effort form.

JUDGE NEWMAN: Does that have to be on three different days?

THE WITNESS: Not necessarily.

JUDGE NEWMAN: When you say "not necessarily", if all three are on the same day, does it count?

THE WITNESS: It may raise a question, but if there are three this week on the same day and next week three on separate days, then it doesn't create a problem, but if all of the effort in each week is confined to a single day, then it raises a question as to whether the individual is doing all that he can be reasonable expected of him.

JUDGE NEWMAN: When you say he is told at the beginning what the ground rules are, you say he is told if he sees three a week, that's sufficient, is that correct?

THE WITNESS: That's sufficient as long as there

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is no other issues.

JUDGE NEWMAN: On this issue of availability for work?

THE WITNESS: Yes.

JUDGE NEWMAN: Of seeking work?

THE WITNESS: Yes.

JUDGE NEWMAN: He is told that three a week is enough?

THE WITNESS: Yes.

JUDGE NEWMAN: Is he also told that if all three show up on the same day, that that is going to raise a question?

THE WITNESS: I won't guarantee that's done.

JUDGE NEWMAN: In this case there is an affidavit from someone who was disqualified because their appearances all showed up on the same day, and they had a reason, they said that's the only day they could get out to make family arrangements to go out and look for a job.

THE WITNESS: If the individual consistently is making themselves -- or entering the effort -- field one day a week, then there is a question in my mind as to whether or not this individual is fully attached to the labor market and,therefore, the question

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must be raised and a determination made from the facts obtained on such hearing.

JUDGE NEWMAN: But the claimant doesn't know to begin with that putting down three appearances on day is going to raise the question, is that right?

THE WITNESS: That's right.

JUDGE NEWMAN: He doesn't know that?

THE WITNESS: Yes.

JUDGE NEWMAN: When he goes for his two-week benefit, he doesn't know he is going to have to meet the claim that he hasn't made a good enough effort for all three --

THE WITNESS: He wouldn't be denied on the initial situation.

JUDGE NEWMAN: He wouldn't?

THE WITNESS: Not generally, no.

JUDGE BLUMENFELD: How many times do you have to catch him trying to cover three bases the same day?

THE WITNESS: Well, we have to consider reasonableness with the claimant, and if he is not aware that he has caused himself harm, we must warn him about his efforts so that --

JUDGE BLUMENFELD: You do throw it up to him at some stage, "Look at it, you're only out one day a week,"

is that right?

THE WITNESS: Yes.

JUDGE BLUMENFELD: You do that before you throw him out?

THE WITNESS: Yes.

BY MR. CREANE:

Q That's not written policy, that's something that's supposed to be understood by all fact finders in the State?

A Yes.

Q And the claimants, you stated they were told that as long as they had three places listed, it would be all right. Was that anywhere in writing, was that ever given to the claimants in writing?

A No, we don't have that in writing to them.

Q They were given other written instructions on telling them, explaining the form that employers were not required to sign it?

A No, the employers are not required to sign it.

Q Now, it's explained in writing to the claimants?

A The form says that the employers are not required to sign it.

Q But certainly things are put in writing, but they weren't told that three places would get them their checks, that wasn't put in writing?

A No.

Q It's not in writing in any policy that three checks -- three places are enough to get you checks?

A That's right.

JUDGE BLUMENFELD: Do we have anywhere what you have given us, any statistics as to how many are terminated for not making themselves sufficiently available?

MR. CREANE: Yes, your Honor.

JUDGE BLUMENFELD: And what percentage that is of those who were terminated?

MR. CREANE: Yes, your Honor, it's not broken down by -- two of the categories are lumped together, availability and reasonable effort to make work. That's in our Exhibit No. 4. That one that Judge Smith had out at the beginning of the testimony.

JUDGE BLUMENFELD: These figures are over a period of how long?

MR. CREANE: It goes back a year and a half. We have monthly reports.

JUDGE BLUMENFELD: Are we talking about a substantial period here?

MR. CREANE: In 1972, out of 1900 terminations involving situation we are trying to get a hearing for, 1339 were for available and actively seeking work.

1,339 out of 1901.

JUDGE BLUMENFELD: Were terminated because they did not make themselves available?

MR. CREANE: Were not available and reasonable effort to make work. About 213 were on the referral, refusal of a job, where that involved -- that could involve a situation where an employer sent in a card and he says, "I didn't want it," but the bulk are available and reasonable efforts to find work.

MR. WASIK: If I may interject at this point, I was going to raise this point when it was my turn so it won't get lost, as counsel has stated, that category of able and available and reasonable efforts, there are two separate categories that are lumped together, and the Court should be aware of the fact that able and available will include denials or disqualifications for benefits at the initial stage, as well as interruptions where people have already been collecting so that we don't know exactly how many are denied after they have already been collected -- collected and,therefore, as I say, I was going to point out in the stipulation that we signed, this figure of 60 to 70% is not accurate and I will allude to that later at my turn.

JUDGE SMITH: We will take a short recess.

(Recess taken.)

MR. CREANE: Your Honor, you asked earlier if I considered the witness a hostile witness, and while I don't consider him hostile, because of some questions that have come up during the latter part of the questioning, I don't feel bound to accept every answer that he has given because --

JUDGE BLUMENFELD: I understand.

BY MR. CREANE:

Q Mr. Hatcher, what is the average length of time that an unemployment compensation recipient receives benefits during a particular claim series in Connecticut?

A During 1972 it was 15.2 weeks.

Q 15.2 weeks?

A Yes.

Q On an exhibit, Exhibit 31 that we have introduced in this case, shows that 90% -- in 90% of appeals to the unemployment commissioner more than 100 days passes between the time the person applies for a hearing and the date he is given a written decision by the Commissioner, and then about 30% of the cases it's a delay of more than 150 days.

Now, does that tie together your fact on the average length of -- that he collects benefits with the long

delays on the appeal processes in Connecticut, wouldn't that mean in many cases that a worker has already gone back to work by the time he gets the decision reversed and gets his benefits?

A It's a difficult question to answer yes or no.

Q Is there any factor other than applying the two figures together to arrive --

A There is an issue. Some of the disqualifications are statutory disqualifications for the week of and the four following weeks, some are disqualifications that last only one or two weeks, therefore, the individual has been receiving benefits beyond the period involved prior to his hearing, prior to going back to work.

Q But if the average period of time in which he draws benefits during a claimed series is 15 weeks, and the average period of time waiting an appeal says is 20 weeks, then, in many cases, the man will already have returned to work by the time he gets a decision?

A Yes.

MR. WASIK: Will theCourt note a continuing objection to this line of questioning in view of my earlier objection, which was overruled, as to this information coming in?

JUDGE SMITH: Yes.

Q Do you have any figures, Mr. Hatcher, on the number of

times that a claimant will come back to initiate a new claimed series during a particular week, is it frequent that a worker will be unemployed, collect benefits, come back to work and come back for the same year to file another claim?

A Yes, there is a substantial number or substantial percentage of our claimants who get involved. I do not have the statistics on that.

JUDGE BLUMENFELD: Repeaters?

THE WITNESS: What they are are people who have been unemployed for short periods of time who may go to work for a short period of time and reopen their claim during a benefit year, during the existing benefit year.

Q If during the first claim during a claim year there is an overpayment involved for some reason the claimant was given benefits, say, he was given benefits pending the hearing, is the Department free to offset any overpayment against a later claim that he makes with the Department?

A Yes. We are required to offset overpayments that have been established as overpayments before paying additional benefits.

Q The Department is also free, isn't it, under the statute, to seek reimbursement for any overpayment by whatever legal method is necessary, including civil lawsuit?

A Yes.

Q And do you think there is some distinction between the case with welfare where most of the claimants are judgment-proof and unemployment where very often the worker has a job and has some assets, when the Department seeks repayment for an overpayment?

A Is he judgment-proof, are you asking?

Q Could you give us the figures on the percentage that the Department recaptures when an overpayment is involved?

A During the period from January of 1972 to March of 1973, the total amount overpaid from benefits were $1,830,178, the amount recovered of that amount was $916,093.

Q So that's about a 50% recovery rate?

A Yes.

Q Are those for comparable periods, do you have an overpayment in the period, but aren't the repayments for possibly earlier overpayments?

A There could be some earlier overpayments involved.

Q It doesn't necessarily mean that all of that 1.8 million has been written off?

A No.

Q That the Department has given up attempting to recover?

A No, it doesn't.

Q So if the man comes back in on a later claim, they can offset --

A Offset against further benefits, that's right.

MR. CREANE: I have no further questions at this time.

CROSS EXAMINATION

BY MR. WASIK:

Q To go back to a few of the subjects mentioned in direct examination, Mr. Hatcher, first, let's establish, is eligibility established on a week-by-week basis or biweekly?

A On a week-by-week basis.

Q But they come in biweekly?

A Yes.

Q It's possible for a man to be eligible one week and ineligible the second week?

A That's correct.

Q I believe earlier you stated that the benefit of the doubt was given to the claimant and there was nothing in writing on that particular point. Do you wish to change that testimony?

A Yes, I do. It is now legislated that the claimant be given the benefit of the doubt.

Q This is in our statutes now?

A In the statutes, yes.

Q Now, in the situation where a man comes in who is obviously under the influence of liquor or drugs, I believe you stated that if he met the requirements of the Act, he was paid

for the prior two weeks, but that it would be noted in his record that on that particular day he was unavailable, is that correct?

A Correct.

Q Would there be occasion or reason or is it done, I should say, under such circumstances, to withhold payment of the check on that day?

A There are situations where we would withhold payment of that check merely to protect the individual. If the individual appeared not to be in condition such that he could handle the disbursement of money, we would have him report back to us the following day in order to pay him for the prior two-week period.

Q If he were sober or no longer under the influence of drugs, would he be paid?

A He would be paid, yes.

Q Would that fact also be noted that he was in sober condition in the records so that when he came back for his next regularly scheduled interview, if he presents evidence that he was otherwise able and available for work and made sufficient efforts to find work, would he be denied benefits for that first week?

A No, he would not, as long as he established that he was available for work throughout the major portion of the week.

Q So even though that one day he may not have been able, if he satisfies the interviewer that the majority of the week that

he was, he would be paid?

A That's right.

Q Where there is information from a prospective employer that a claimant either failed to show up at an appointed time to apply for a job, or actually refused a job, this prospective employer is contacted, either by telephone or by being contacted by himself, is that correct, in other words -- I wasn't phrasing that very well.

The contact that you have with the prospective employer is either by telephone or from some communication from him, is that correct?

A Yes, that's right.

Q He is not required to be present at the hearing?

A No, he is not.

Q These prospective employers are registered with the employment service office, is that correct?

A Yes.

Q As a prospective employer, is he an interested party in the hearing?

A He could be an interested party.

JUDGE BLUMENFELD: Not simply because he is a prospective employer, there would have to be some other reason?

Q Isn't it true --

A Well, he could be the prior employer who could apply for a merit rating credit on the charge that has been against him.

Q In most cases, if you can state, is such a prospective employer an interested party?

A Where there is a credit, yes, but not where there is no credit.

Q What would happen to the efficiency of the employment service bureau if these prospective employers were required to come to such a hearing, in your opinion?

MR. CREANE: Objection. I don't know if he is in a position to give testimony of what would happen to the employment service.

Q Have you had experience with the employment service, Mr. Hatcher?

A I have worked in field offices in close proximity to the employment service as -- in all capacities up through manager of the Unemployment Compensation office in the field.

MR. WASIK: I submit Mr. Hatcher is qualified to answer that question.

THE COURT: Overruled. You may answer.

A If the individuals failed to accept job offers and there was a continuance of payment of benefits, it is possible that the employers themselves may become dissatisfied and withhold the job openings from the employment service and fill them

through their own means.

Q Have there been complaints that you are aware of of prospective employers of being bothered by the apparent lack of interest by claimants in the proposed jobs?

A Yes. It's been historical that the employers have with whom I had a good relations were concerned about the lack of interest on the part of some claimants in accepting job referrals.

JUDGE NEWMAN: I'm not sure I understand you. Is it your point that if an employer had to come to a hearing to say that he offered a job, that the result of that might be that he, in fact, wouldn't offer the job in the first place?

THE WITNESS: No. What I'm saying, that where the -- where we fail to take the action that was proper in the case of a job refusal, that the employer may become so dissatisfied with our service that he would not seek the service of the public employment security division.

JUDGE BLUMENFELD: He would resent the fact that you didn't give credit to his statement that the job had been refused, right?

THE WITNESS: Yes.

JUDGE BLUMENFELD: And then would turn elsewhere?

THE WITNESS: Yes.

Q What effect would this have on the employment service bureau itself, in your opinion?

A The employment service division of the employment security division depends largely on their placements in order to establish their budget and to keep in operation.

Q You stated that claimants were told searching for work three times a week was what was required. Can you say whether or not this was stated or is stated as policy that they must go to three places, or as a general rule of thumb this is something they must do?

A This is stated as a rule of thumb, however, no one is denied on a failure to make three efforts in a week until the quality of the effort has been reviewed. The number of places that they apply is not the controlling factor. The number of places they apply is helpful for the line examiner in screening which ones need an interview, but the final determination is made upon the quality of effort, rather than the quantity.

Q Now, counsel asked you in reference to ES Form 207 for the month ending December 31, 1972, how many persons were denied on the basis of able and available and actively seeking work, and I believe the total was 1339 out of 1901 denials?

A Yes.

Q The 1900 denials is one figure, but how many decisions

were made, how many claimants in all were made, or were interviewed in culling out this 1339 denials?

A This figures represented close to 80,000 persons, or approximately 300,000 weeks claimed.

JUDGE BLUMENFELD: How many?

THE WITNESS: About 80,000 claimants. You see, the claims are filed by individuals. Of the number that were denied, that denial figure was 1900, and it's a very small percentage of the total claim load.

JUDGE BLUMENFELD: Out of 80,000?

THE WITNESS: Yes.

JUDGE SMITH: Two and a half percent.

THE WITNESS: Close, yes.

MR. WASIK: I have no further questions on cross examination. I don't know if counsel has any further redirect. I did have a few other questions that I wanted to ask Mr. Hatcher on direct examination.

MR. CREANZ: You may go ahead. I have one, but I will save it until the end.

MR. WASIK: I shall want to introduce further exhibits through Mr. Hatcher. I believe the Clerk has them already. Exhibit C, which is a booklet: the rights and responsibilities booklet.

THE WITNESS: Yes, that's the name.

BY MR. WASIK:

Q Is this given to each claimant who files for unemployment compensation benefits?

A These are given to each claimant who files a new claim for unemployment benefits. They are also made available on the continued claim line for those who may havelost or destroyed their copy, and they can pick them up at any time that they would want them.

MR. WASIK: Also, at this time I would introduce at this time Defendants' Exhibit E, which I believe was filed at a prior hearing. Counsel has copies. It's concerning the procedures to be followed in implementing the job and decision requirements, there is no objection to that being entered.

And the last exhibit, Exhibit D, is an interoffice letter dated April 2, 1973, sent from the Adjudication Center of the Unemployment Compensation Department to all employment security division managers and field supervisors. I believe counsel has a comment to make upon that.

MR. CREANE: I'm not sure for what purpose it's being introduced.

MR. WASIK: It's being introduced to show what policy is in regard to procedure to be followed

where the claims examiner has received information from an employment service representative stating that a claimant has refused to accept a referral to a prospective job and the procedure spells out that the employment service representative is to be present at the hearing when the claimant comes in.

MR. CREANE: For that purpose, I have no objection.

JUDGE NEWMAN: It may be marked.

(Document received in evidence.)

MR. WASIK: I would also ask the Court to look at the stipulation to facts signed by both counsel on Page 7. In Paragraph 14, this is what I alluded to earlier, is the reference that the denials for able and available and actively seeking work constituted 60 to 70%, and I would just ask the Court to mark that in such a way that -- I am not stipulating to that fact, but subsequent to sending that to the Court I learned that this figure included denials which were made at the initial determination of a person's eligibility, thus, that figure is, in my estimation, not correct.

JUDGE BLUMENFELD: It includes initial denials?

MR. WASIK: Yes.

JUDGE BLUMENFELD: Could you separate them out?

MR. WASIK: There is no way, no. The statistics are such that they are lumped together. I don't know why, but they are.

JUDGE NEWMAN: By denial you mean lack of entitlement?

MR. WASIK: No. A person can be entitled, but he may say that, "I am only going to accept work on the first shift, or I will only work for anybody within 15 miles from my home, some type of restriction.

JUDGE NEWMAN: That would bear on his availability for work?

MR. WASIK: Yes, but it would be initial determination and not at -- after he has been determined eligible and started to receive benefits, we are concerned with an interpretation of benefits and what type of hearing the person gets then. These denials come right at the beginning when they say, "Well, I'm sorry, you are not available and, therefore, you are not eligible." So a man didn't get to receive benefits until he cures that defect.

JUDGE BLUMENFELD: That attacks the standard rather than the degree of compliance with it, whatever it is.

MR. CREANE: I don't think there is a significant difference between the two categories.

JUDGE BLUMENFELD: I can see a difference.

JUDGE NEWMAN: Is it part of your lawsuit, that type of denial?

MR. CREANE: No, it's not.

MR. WASIK: It is significant to me to say that this type of denial constitutes 60 to 70% when it doesn't. It's much less, if you consider that the number comprising this so-called 60 to 70% concerns initial denials and not denials that interrupt payments.

JUDGE NEWMAN: Do you have any basis for estimating what portion of all the denials that the plaintiffs are talking about are the ones you are talking about?

JUDGE SMITH: Perhaps the witness can.

THE WITNESS: It's very difficult for me to estimate, however, I can say it includes cases where people are ill and come in seeking benefits and not meeting the eligibility requirements. They may have injuries and other things that do not qualify them under the benefit. They are a small percentage, I would say, of the total number of cases, but I can't give you an estimate.

JUDGE BLUMENFELD: That they are not able?

THE WITNESS: They are not able.

JUDGE BLUMENFELD: And don't qualify?

THE WITNESS: Yes.

JUDGE BLUMENFELD: What about the other class where they have certain standards of their own as to where they are going to work and what kind of work they are going to do?

THE WITNESS: This is also a small percentage.

JUDGE BLUMENFELD: Of the group that are not getting --

THE WITNESS: Yes.

JUDGE BLUMENFELD: I don't know what a small percentage is.

THE WITNESS: I don't want to give an estimate without some fact behind it.

BY MR. NASIK:

Q Can you give us an approximation of how many claims were filed weekly at the peak of the economic situation in the last two years or so?

A Approximately --

JUDGE BLUMENFELD: You don't mean the peak.

THE WITNESS: Yes.

JUDGE BLUMENFELD: You are talking about the

depth, aren't you?

THE WITNESS: It's a peak load for us.

A The initial and continued claims together in the early part of 1971 went as high as 118,000.

Q That's the number of claimants per week?

A Number of claimants per week.

Q What is it right now, do you know?

A It's approximately 40,000.

Q How much was paid out each week?

A We exceeded $6 million per week in payments during the peak. We are down now slightly over $2 million per week.

Q Could you tell us what the average weekly benefit rate is?

A About $66.67 -- 66.64. That was in '72.

Q $66.64?

A Yes, that includes dependency allowances.

JUDGE BLUMENFELD: Per case, then?

THE WITNESS: Yes.

Q Of course, when an appeal is taken of the administrator's decision to the Unemployment Compensation Commissioner, he renders a decision. Can you tell us the percentage of reversals by the Commissioner of the administrator's decision?

A It's about 18.8%.

Q Is that presently the situation?

A This covers the period from May of 1972 through April, 1973.

JUDGE NEWMAN: That's the percentage of administrative decision reversed by the Commissioner, or Commissioner's decisions reversed further up the line?

THE WITNESS: This is the administrator's decision reversed by the Commissioner. In that period there were 9,112 administrator's cases before the Commissioner -- decided by the Commissioner, of which number 1,720 were reversals.

JUDGE BLUMENFELD: What do you call your administrator, a hearing officer?

THE WITNESS: Fact finding examiners make the decision for the administrator.

JUDGE BLUMENFELD: A fact finding administrator, reversed 18.8%?

THE WITNESS: Yes.

MR. CREANE: Is that referring to all hearings, because we have appeals from an initial denial of eligibility and appeals in cases we are talking about from a denial on a continued basis, I am not sure --

THE WITNESS: From all.

JUDGE BLUMENFELD: You don't know how many of these reversals there were on these terminations of

cases?

THE WITNESS: NO, I do not. Not these particular cases.

Q Is that information available, do you know?

A No.

MR. CREANE: I think those figures are available. In one of the reports that the Department submits to the U. S. Labor Department it breaks it down by initial denial and by the results in each of the two categories.

JUDGE BLUMENFELD: This is called continual denial?

MR. CREANE: Denial on a continued claim as opposed to denial on an initial claim.

THE WITNESS: That is the agency report and not the Commissioner's decision report. The Commissioner's decision is not broken down in that fashion.

Q When a denial is made, payments are withheld. Is this denial a forfeiture of that week's benefits?

A No, it's a postponement of eligibility. The individual durational amount is charged only the dollar amount of moneys collected by him.

Q So if he should continue to file, that money would still be available for him, is that true?

A Yes.

Q Reference has been made to the great delay in getting

out decision once an appeal of the Commissioner's decision has been made. Can you tell us, in your opinion, what the reason is for this delay?

A The work load that was before the unemployment commission, they presently have over 6,000 back-log cases.

JUDGE BLUMENFELD: Manpower, is that the reason for the delay?

THE WITNESS: Manpower and work load.

Q Can you tell us what the effect would be if a claimant upon coming in and being seated for an interview and an examiner finding that he didn't make reasonable efforts if he then had to schedule another hearing, say, approximately a week's time, what effect would that have on the administration?

A I would say on the basis of the staffing provided, we would be unable to handle the number of cases involved.

JUDGE BLUMENFELD: You mean you can only handle them on a biweekly basis?

THE WITNESS: We had to handle on a biweekly basis because of the taxing of the office space and staff, yes.

JUDGE SMITH: Did you have more staff when you had 118,000 --

THE WITNESS: Yes, substantially more. We are budgeted on a work load basis, and as our work load

drops, our staffing drops. Our staffing during the peak was better than 1,050 people. We are down now to approximately 550 people.

JUDGE NEWMAN: Who makes the determination to take the person out of the line where he is going to get his benefits and send him over to wherever he gets the seated interview?

THE WITNESS: It must be made by the line examiner.

JUDGE NEWMAN: If the line examiner, instead of sending him over to this other room -- is this in the same building?

THE WITNESS: Yes, the same office space.

JUDGE NEWMAN: If he said, "Instead of going over there now, go over three days from now when there is going to be a hearing, to see if you made sufficient efforts," would that change the work load of your agency?

THE WITNESS: Well, a lot of our work load -- I should say it this way -- we schedule our continued work load and we are scheduled, and we anticipate being able to handle what work load is before us, we do have some say in work load that we cannot control. Issues that arise on initial claims, including the questions of some dependents in allowances, therefore, we are

in a better position to handle on a one-visit basis than we are to handle on a subsequent basis.

JUDGE NEWMAN: On any given day you presumably have an estimate on how many seated interviews that are going to be?

THE WITNESS: Yes.

JUDGE NEWMAN: You are staffed to go to take care of that?

THE WITNESS: WE hope we are staffed to take care of that.

JUDGE NEWMAN: You try. If tomorrow you told all your line examiners, instead of sending them for seated interviews, immediately send them for seated interviews three days later, would that in any way add tc the administrative burden of the agency?

THE WITNESS: Well, that would, because there has to be a decision or a determination on this day that the individual files a claim for benefits whether or not he should be paid. Now, if you postpone that until three days hence, that record again has to be handled in order to determine whether or not that payment, if made, should have been made.

JUDGE NEWMAN: There must be a yes or no decision that day?

THE WITNESS: Yes, there has to be a yes or no decision that day.

JUDGE NEWMAN: What requires that?

THE WITNESS: For the purpose of operations. If you have to handle each individual so involved twice, it takes extra time to handle, because there is a claim record card that must be pulled and presented to the interviewer who is going -- or the claims examiner who is going to handle, and you have your lines scheduled for the operations -- most of whom are paid in the course of the day.

JUDGE NEWMAN: I am only talking about the ones where the line examiner thinks maybe it shouldn't be paid.

THE WITNESS: I understand that.

JUDGE NEWMAN: AS to those, he now says, "Go across the room right now and have a hearing"?

THE WITNESS: Yes.

JUDGE NEWMAN: Which you call a seated interview, and I want to know what burden would there be if he said, "Come back in three days and have a hearing or seated interview"?

THE WITNESS: Well, if we did not pay, then we would have to justify the fact that it was not paid

through the facts that arise, but if we had to pay and then interview, we may be setting up overpayments in cases where payments should not have been made.

JUDGE NEWMAN: What do you do in the case that you told us about a little earlier where the man goes for a seated interview and he says -- and the employer card says, "We offered him a job," and man says, "WE -- I didn't get one," and your response to us earlier was that you check into that further?

THE WITNESS: Yes.

JUDGE NEWMAN: Do you make a payment that day?

THE WITNESS: They have to check it right while the claimant is there. Now, there are cases where due to the circumstances of the case whereit may be held for one additional day, and the examiner will pursue the information, and if payment is due, the payment would be mailed to the individual rather than have the individual come back.

BY MR. WASIK:

Q The line examiners and the fact finding examiners, can you tell us briefly what kind of training these people receive?

A We attempt to have group training where the fact finders -- the line examiners first come in, they have to learn the different facets of the work. We try to give them an entrance

training for several days in the central office, then they are put to work with more experienced people in different areas. There are many areas from which they work, and as they gain experience, there is continuous training of these individuals.

The fact finding examiners basically are people who have worked as line examiners, have become exposed to the fact finding operation. They receive their appointment as fact finders through promotions. They are given group training to begin with, they are --

JUDGE BLUMENFELD: Are we really concerned greatly with the quality and competence of the personnel in this case?

MR. WASIK: I think we are, your Honor, because the plaintiffs are laying great stress on the fact that these people are the ones who make the decision initially, whether or not payments will be interrupted, and they are claiming thatthe standards of the statute are very vague, that these people are pretty free to do anything they want, and I am trying to establish that these people are highly trained, they are continually trained, and they have guide lines to guide them that are issued periodically by the Department.

JUDGE NEWMAN: Is it your claim that the more training a decision maker has the less procedural

due process right a person has to appear before him and have a due process hearing?

MR. WASIK: No, not at all. I am trying to show --

JUDGE NEWMAN: What difference what his training is? They are not saying he is incompetent, they say they want the right to certain procedures to be before him.

MR. WASIK: Maybe I am anticipating counsel's argument.

JUDGE BLUMENFELD: It's pretty late in the day to allow that. We are at 5 o'clock now.

MR. WASIK: I won't pursue the matter further. I have no further questions.

MR. CREANE: I have one question.

REDIRECT EXAMINATION

BY MR. CREANE:

Q When an employer, you say when he is defined as being an interested party, that the defendant will take into account any information supplied by him as a third party in making a decision, for example, on refusal of a job, is that correct, when he is an interested party?

A I didn't limit it to the interested party, but where he is an interested party, yes.

Q For example, where he was the person's last employer?

A Yes.

Q Doesn't that person stand to benefit if the claimant is denied benefits? Isn't his -- he doesn't have to pay as much into the unemployment fund?

A His merit rating charge credit establishes -- helps to establish what his rate of contribution would be, yes.

Q So he has a financial interest if the person is denied benefits?

JUDGE BLUMENFELD: That's on eligibility.

MR. CREANE: This is a continued --

JUDGE BLUMENFELD: We are concerned about availability.

MR. CREANE: This is on availability and reasonable effort, your Honor.

JUDGE BLUMENFELD: If he is already being made available, the employer is stuck with him as one who is eligibleand, therefore, was not -- didn't leave the job improperly. Am I accurate about that?

THE WITNESS: Yes. The only point at issue would be a refusal of work.

Q That's the situation I am talking about.

A The facts of unavailability would not give the employer credit. The question on the individual's ability to work

would not give the employer any credit on the charge. It's only on a work refusal.

Q If the former employer says, "He refused a job when I offered it to him," then he would stand to benefit, would he not?

A Yes.

JUDGE BLUMENFELD: Who would?

THE WITNESS: The employer would on a credit. If it's within six weeks of the charge week.

Q But he is not required to be at the hearing, even though he has a financial stake in the outcome of that seated interview and the Department can rely on his second-hand information, even though he has a financial interest in the outcome of it?

A I can't accept "rely on", because there is no determination made until the claimant is confronted with the information given, so it's not relying on the employer, it's relying on the facts, total facts in the case.

Q I understand, but if there is a difference of opinion, they may decide in favor of the employer that the claimant is not telling the truth, is that correct? I think you already stated that.

JUDGE BLUMENFELD: We are aware of the point you are trying to make, Mr. Cresne.

Is there something else?

MR. WASIK: I guess you can step down. I have a few questions of Mr. Eisenman.

(Witness excused.)

Def. Ex. C

YOUR RIGHTS AND RESPONSIBILITIES

UNDER

THE CONNECTICUT UNEMPLOYMENT COMPENSATION LAW

CONNECTICUT LABOR DEPARTMENT
EMPLOYMENT SECURITY DIVISION
UNEMPLOYMENT COMPENSATION DEPT.

OCTOBER 1, 1971

This booklet explains in brief form your rights and responsibilities under the Connecticut Unemployment Compensation Law. It provides information to help you file your claims for unemployment benefits and to understand how your benefits are determined.

It is in your interest to read it and follow the instructions. If you have any questions which are not answered here, visit, telephone or write to one of our offices. DO NOT SEEK ADVICE ELSEWHERE — you may be given the wrong advice and thus be deprived of benefits which are rightfully yours.

It is the intent of this department to pay every eligible worker the unemployment benefits to which he is entitled. It has made provision for payment with the utmost speed. Your cooperation is necessary to accomplish this objective.

JACK A. FUSARI
Labor Commissioner

CARL D. EISENMAN
Executive Director

TO START YOUR CLAIM

- Report in person to an office of the Employment Security Division AS SOON AS POSSIBLE after becoming unemployed. You *cannot* receive benefits for weeks of unemployment before you file your first claim.
- Bring your Social Security Card and Unemployment Notice. DO NOT DELAY FILING if you do not have them. Your claim *can* be taken without them.
- Register for work with the Connecticut State Employment Service.
- Report to the Unemployment Compensation Department and file your claim for unemployment benefits.

  Be sure to report to *both* of these agencies — they are usually located in the same office.

TO CONTINUE YOUR CLAIM

- You will be given a claim to complete at home and bring with you at your next scheduled reporting time.

  Complete all items *except* the signature. Wait to sign the claim at the office in the presence of the claims interviewer.
- REPORT ON THE DAY AND AT THE TIME FOR WHICH YOU ARE SCHEDULED.

  You will be scheduled to file your claim at a particular time. If, for any reason, you

cannot report on your scheduled date or time, come to the office AS SOON AS POSSIBLE following the appointment.

A scheduled appointment permits you to file your claim and receive your check as promptly as possible. If claims were not scheduled throughout the week and all claimants could come at any time, there would be long lines and considerable waiting.

If you cannot report as scheduled because you have returned to work, you may file your claim by mail, as explained on pages 12—13.

- BRING YOUR IDENTIFICATION CARD AND CLAIMS BOOK (if you have one) FOR PROMPT PAYMENT OF BENEFITS.
- REPORT ALL WORK DURING THE WEEK FOR WHICH YOU ARE CLAIMING BENEFITS.

  Even though payment for the work might not have been received, the work must be reported and wages *payable* must be deducted in computing your benefits.
- REPORT REMUNERATION OF ANY KIND you have received or *are to receive* from an employer for the week for which you are claiming benefits.

  Report remuneration such as: wages and earnings of any kind, vacation pay, pension payments, casual earnings, dismissal payments, severance pay, or wages in lieu of notice.

- REPORT ANY CHANGE in address, marital status, number of dependents, etc.
- FILE YOUR CLAIM FOR PARTIAL BENEFITS when you receive notice from your employer of the amount of your earnings for a calendar week of less than full-time employment. A claim for partial benefits may be filed *within* four weeks from the date you receive notice of your earnings.

  If you have them, bring any forms confirming the gross amount of your earnings, such as payroll vouchers.

ELIGIBILITY REQUIREMENTS

To receive benefits for any week, you must:

- Be totally or partially unemployed;
- Have filed your claim for benefits and have kept your work registration active at the Connecticut State Employment Service;
- Be physically and mentally able to work, available for work and making reasonable efforts to find work;
- Have been PAID wages by a "covered" employer during your base period equal to at least 30 times your benefit rate. Some part of these wages must also have been paid or earned in at least 2 different calendar quarters of your base period.

AMOUNT OF BENEFITS

The amount of your benefits is computed from the record of the wages paid to you in COV-

ERED EMPLOYMENT during the BASE PERIOD of your current BENEFIT YEAR. Benefits are paid out of the unemployment compensation fund, which is financed by taxes paid by employers only. No *deductions* for this purpose are made from your wages.

BENEFIT YEAR. The "time limit" for drawing your benefits. It starts the Sunday of the week for which you file a valid initiating claim and continues for the remainder of that calendar quarter and for the next 3 calendar quarters, plus the remainder of any uncompleted calendar week at the end of the period.

CALENDAR QUARTERS. The quarter years ending on the last day of March, June, September and December.

BASE PERIOD. The first 4 of the 5 most recently *completed* calendar quarters prior to your benefit year.

COVERED EMPLOYER. After December 31, 1967, an employer of one or more workers during any 13 weeks in a calendar year is subject to the Unemployment Compensation Law at the end of the thirteenth week.

(For *exceptions*, see pages 19—20.)

Other employers may accept coverage through a written agreement with the Administrator.

(See pages 14—17 for Federal, State and Municipal Employees and Non-Profit Organizations.)

EARNINGS REQUIRED TO QUALIFY FOR BENEFITS.

- You must have been PAID wages during your base period equal to at least 30 times your benefit rate. Some part of these wages must also have been paid or earned in at least 2 different calendar quarters of your base period.

- If you received benefits in the preceding year, to qualify for benefits in a SUBSEQUENT benefit year, you must have again become employed and been paid wages of AT LEAST $150 after the beginning of the preceding benefit year.

- WEEKLY BENEFIT RATE. Your weekly benefit rate shall be equal to one twenty-sixth, rounded to the next higher dollar, of your total wages paid to you in the highest quarter of your base period.

  The minimum weekly rate is $15. The maximum weekly rate CANNOT BE MORE THAN 60% of the average wage for production and related workers in Connecticut. The average wage will be determined once a year by the Administrator.

  For new claims effective on or after the first Sunday in October, 1969, and every year thereafter, the maximum benefit rate can only increase by an amount NOT TO EXCEED $6 a year.

- BENEFITS FOR PARTIAL UNEMPLOYMENT.

  If you are employed less than full time during any week, and you earn less than 1½ times your weekly benefit rate, you may be entitled to the difference between your weekly Benefit Rate and 2/3 of your earnings.

- DEPENDENCY ALLOWANCE.

If you are eligible for unemployment benefits, you may be entitled to an allowance of $5 if, after the beginning of your benefit year, your husband or wife is LIVING WITH YOU, is TOTALLY unemployed, and has NOT worked for the past three months. You may also receive this additional benefit if your husband or wife is presently unemployed because of a mental or physical DISABILITY that is expected to last for a long and indefinite period, or because your wife is unemployed and pregnant.

You are also entitled to a dependency allowance of $5 a week for each child or step-child who was being wholly or mainly supported by you, and was under 18 years of age at the BEGINNING of your current Benefit Year, or who was mentally or physically handicapped and was wholly or mainly supported by you because of such handicap, regardless of age. If you acquire any additional dependents during your benefit year, your dependency allowance may be increased during the next complete calendar week. If both you and your husband or wife receive benefits for the SAME week, NEITHER of you

can collect a dependency allowance for the other, and only ONE of you may claim an allowance for each child or step-child.

Total dependency allowances cannot be more than 50% of your Weekly Benefit Rate (in whole dollars).

NUMBER OF WEEKS OF BENEFITS

You cannot receive more than twenty-six weeks of regular benefits for total unemployment.

MAXIMUM BENEFIT AMOUNT

You will be limited to either 26 times your unemployment benefit rate *or* an amount (including your benefit rate and dependency allowances) not to exceed 75% of your base period earnings, whichever is less.

BENEFITS PAYABLE DURING PERIODS OF SUBSTANTIAL UNEMPLOYMENT

Substantial unemployment exists when the rate of insured unemployment for the most recent 13-week period equals or exceeds 4% and is 120% or more above the average of rates for the corresponding 13-week period in each of the preceding two years. During such a period, EXTENDED benefits will be payable in an amount equal to your regular weekly benefit rate, plus dependency allowances, for up to 13 weeks under a Federal-State cooperative agreement. If you have received the maximum amount of REGULAR and EXTENDED benefits prior to the end of your current benefit year, you will

be paid for the remainder of your benefit year ADDITIONAL benefits in the same amount for up to 13 weeks. You cannot receive ADDITIONAL benefits under the State law until you have been paid the full amount of your entitlement to EXTENDED benefits under the Federal-State agreement.

DISQUALIFICATIONS

If it is found that your unemployment is due to any of the *three causes* below, you will be DISQUALIFIED FOR BENEFITS FOR THE WEEK IN WHICH THE SEPARATION OR FAILURE OCCURRED *and* the FOUR WEEKS IMMEDIATELY FOLLOWING.

In such cases, your BENEFIT PAYMENTS will be POSTPONED and the PERIOD OF DISQUALIFICATION must elapse before you are again eligible for benefits.

- You left suitable work VOLUNTARILY and WITHOUT SUFFICIENT CAUSE CONNECTED WITH YOUR WORK.
- You were DISCHARGED OR SUSPENDED FOR WILLFUL MISCONDUCT IN THE COURSE OF YOUR EMPLOYMENT.
- You FAILED WITHOUT SUFFICIENT CAUSE TO APPLY FOR SUITABLE WORK when directed to do so by the Connecticut State Employment Service or to accept suitable work when offered by an employer.

YOU WILL ALSO BE DISQUALIFIED FOR BENEFITS if it is found that:

- Your total or partial unemployment is due to the existence of a LABOR DISPUTE, other than a lockout, in which you are interested or participating.
- YOU RECEIVE OTHER REMUNERATION in the form of wages in lieu of notice, dismissal payments or any payment as compensation for loss of wages, or any other state or federal unemployment benefits; workmen's compensation for temporary disability; retirement pay or pension paid directly or indirectly by an employer if the amount of pension equals or exceeds your benefit rate for total unemployment.

  (See PENSIONS, pages 17—18.)
- YOU LEFT WORK TO ATTEND SCHOOL. You will remain ineligible for benefits during attendance at a school, college or university as a regularly enrolled student.
- You voluntarily retired from your employment for reasons other than the fact that your work became unsuitable in view of your physical condition and the degree of risk to your health and safety. In the event of such retirement, you will remain ineligible until you have again become employed and have been paid wages amounting to 30 times your benefit rate.
- You received BENEFITS IN A PRIOR BENEFIT YEAR AND WERE NOT AGAIN EMPLOYED AND PAID WAGES OF AT LEAST $150 SINCE THE BEGINNING OF THAT BENEFIT YEAR.

- You left your job because of PREGNANCY or were discharged because of pregnancy in accordance with a reasonable rule of your employer providing for the separation of pregnant women.

  No woman is eligible to receive benefits during the period of two months before childbirth and if the child is alive, such ineligibility continues for two months after childbirth.

  You will continue to be ineligible for benefits after childbirth until you have applied without restrictions for reemployment with your most recent employer after the expiration of the two-month disqualification period.

  If you refuse to accept such reemployment, benefits may be denied in accordance with the refusal of work provision stated above, and you will continue to be ineligible until you have registered for work at the Connecticut State Employment Service, applied without restrictions for suitable employment, and are available and making reasonable efforts to obtain work.

  A doctor's certificate may be required to establish the date of expected childbirth or physical ability to work. Whenever there is a question about your eligibility to receive benefits, you will be given the opportunity to review all facts about your claim with a claims interviewer. A decision as to eligibility or disqualification is made only on the basis of facts required by the law.

PRE-DETERMINATION HEARINGS

If a question arises about your eligibility for benefits, an informal pre-determination hearing will be scheduled at the office where you are filing claims. You will be notified in advance of the time, place and purpose of the hearing, and of any evidence, such as medical certificates, that may be required.

You will have the right to bring witnesses if you wish to do so. If your former employer is involved, he will also be notified in advance of the hearing and will have the right to attend or furnish information by mail or telephone. The employer also has the right to representation.

If you are unable to attend such a pre-determination hearing at the scheduled time, you should notify the office so that rescheduling or other appropriate action may be taken. Requests for postponement will be granted only in compelling circumstances. It is to your advantage to appear as scheduled and to co-operate fully in providing the information necessary to determine your eligibility. Failure to do so might result in denial of benefits, since claims must be decided on the basis of information available.

APPEAL RIGHTS

- If you are notified that your claim has been disallowed or that you have been disqualified for benefits, you may appeal to an Unemployment Commissioner. You must *file* your appeal within 7 days of the mailing date of your notification, exclusive of Sundays and Holi-

days. The appeal period will be extended to the next business day if the last day for filing falls on any day when the office is closed.

You may file an appeal by presenting your decision letter to the office where you filed your claim and requesting an appeal from that decision or by sending a letter to that office stating that a hearing is requested. If you desire advice or assistance in filing an appeal, it will be furnished to you by a member of the local office staff upon your request.

The Unemployment Commissioner in your district will notify you of the date of the hearing at which you should appear.

An employer has the right to appeal the payment of benefits to a claimant who was terminated for a reason other than lack of work.

While you are awaiting the Unemployment Commissioner's decision, you should CONTINUE TO FILE CLAIMS, but payment must be held up during any period for which benefits have been denied. If your claim has been approved, you will have the option of receiving immediate payment or postponing payment until a final determination has been made.

Any decision of the Unemployment Commissioner may be appealed to the State Courts by the claimant, employer, or the Administrator.

FILING YOUR LAST CLAIM WHEN YOU RETURN TO WORK.

If you return to work before the scheduled date

for filing your claim, you may file your claim by mail within 90 days after the week of unemployment for which you are claiming benefits.

When a claim is filed by mail, the back of the claim form must be filled in to show the Name and Address of the Employer and the EXACT DATE YOU STARTED WORK. Complete the face of your claim, sign it, and mail it to the office where you have been reporting to file claims. If you do not have a claim form, you may obtain one by writing to the Unemployment Compensation office in your area.

IF YOU MOVE AWAY FROM CONNECTICUT

If you move to another state and desire to file claims for Unemployment Compensation against Connecticut, go to the nearest Employment Security Division office in the other state. Your claim against Connecticut will be taken there, or you will be informed as to the steps to be taken to file your claim. If you are filing claims prior to moving, discuss your plans with the Connecticut office, which will furnish instructions on continuing your claims in the other state.

INTERSTATE CLAIMS

If you have moved to Connecticut from another state where you have potential rights to benefits under the unemployment compensation laws of the other state, you may file your claims at an office of the Connecticut Unemployment Compensation Department. As an agent for the other state, the Department takes your claims, obtains

related information, and forwards the materials to the other state which determines your eligibility and pays your benefits under provisions of its unemployment compensation law.

- If you worked in other states during your base period, discuss the matter with the claims interviewer, who will advise you of the requirements of the state(s) where you have earned wages and potential benefit rights.

FEDERAL EMPLOYEES AND EX-SERVICEMEN

Under an agreement with the Federal Government, the Connecticut Unemployment Compensation Department administers two Federal programs: Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemen (UCX).

If you were a Federal civilian employee or were in active military service, you may file a claim for unemployment benefits in Connecticut under the Connecticut Unemployment Compensation Law. (See Eligibility Requirements, page 3 and Disqualifications, pages 8—10.)

Your benefit payments will be in the same amounts for the same period, under the same terms and conditions as are provided under the Connecticut Law. (See Weekly Benefit Rate, page 5, Number of Weeks of Benefits, page 7, Maximum Benefit Amount, page 7.)

The Federal Government furnishes the funds to pay benefits to unemployed Federal workers and ex-servicemen.

- If you were a **FEDERAL CIVILIAN EMPLOYEE:**

Your benefits will be paid under the Connecticut Law if:

Your LAST Federal employment was in Connecticut; or

You are living in Connecticut and your LAST Federal employment was outside:

The 50 States;

The District of Columbia;

Puerto Rico.

If you are living in Connecticut and your LAST Federal employment was in another State, the Connecticut Law will apply if, AFTER your Federal employment, you worked for a private employer who was COVERED under the Connecticut Law. (If you did NOT work for a COVERED employer in Connecticut AFTER your Federal employment, your benefits would be paid on an Interstate basis under the unemployment compensation law of the other State.)

You CANNOT receive any benefits during the period after separation for which you received a payment for **TERMINAL ANNUAL LEAVE** or **SEVERANCE PAY.**

You will NOT be eligible for benefits if you retired **VOLUNTARILY** from the Federal Civil Service. However, you may be entitled to receive benefits if your voluntary retirement occurred **UNDER CERTAIN CONDITIONS**, or, your retirement was **MANDATORY.** (See pages 9 and 17—18.)

- If you are an **EX-SERVICEMAN:**

You may receive benefits if you had 90 or more days of **ACTIVE** military service (or less than 90 days under certain conditions) and you were separated under **HONORABLE** conditions.

Your benefits will be paid under the Connecticut Law if this is the **FIRST** State in which you filed your claim **AFTER** separation from active military service.

The amount of your benefits will depend on the **BASE PAY** and **ALLOWANCES** you received for the pay grade held by you at the time of your discharge from active military service. Wages earned as a **CIVILIAN** may also be used to determine your benefit amounts.

No benefits can be paid to you until you present your Separation Form DD-214. If you lost, or were not issued, a Form DD-214, this office will assist you in obtaining the form from your branch of service.

Benefits will NOT be paid to you during any period for which you received:

A lump-sum payment for military accrued leave;

A subsistence allowance for vocational rehabilitation training, or, a war orphan's educational assistance allowance from the Veterans Administration;

Military severance pay.

Under the Connecticut Law, if you are a MILITARY RETIREE, your benefits must be REDUCED by the WEEKLY amount of your military pay. (See pages 9 and 17—18.)

STATE AND MUNICIPAL EMPLOYEES

You may be eligible for unemployment benefits if you are otherwise eligible under the Connecticut Unemployment Compensation Law and were employed by:

- The STATE OF CONNECTICUT in the CLASSIFIED service;
- A town, city or political subdivision of this state, excluding services performed by elected officials, members of boards and commissions, and as a professional specialist employed part time.

NON-PROFIT ORGANIZATIONS

Certain non-profit organizations organized and operated for charitable, scientific, literary or higher educational purposes, or for the prevention of cruelty to children or animals became liable under the Connecticut Unemployment Compensation Law as of January 1, 1971. You may be eligible for benefits if you worked for such non-profit organizations, including hospitals.

WHEN YOU RECEIVE A PENSION

A pension paid directly or indirectly by an employer may reduce the WEEKLY AMOUNT of

benefits payable to you by the amount of your weekly pension payment.

If you are unemployed and receiving, or about to receive, a pension or retirement pay from an employer, you should report this payment — *whether it is paid in a lump sum or not* — in order that your rights to unemployment compensation may be properly determined. Each case is determined individually, according to the type of retirement plan.

INTERVIEWS WHEN YOU FILE CLAIMS

HAVING OTHER CLAIMANTS WAIT BEHIND THE WHITE LINE IN FRONT OF THE CLAIMS COUNTER provides privacy for your brief interview when you file your claim.

When you are awaiting your turn in line, you are asked to "wait behind the white line" to give the same privacy to others.

INTERVIEWS

Seated interviews are given when more information is necessary. Such interviews are conducted to:

- Give you information about your benefit rights;
- Answer your questions;
- Adjust your benefit payments;
- Determine your eligibility for benefits.

OVERPAYMENTS

If you receive any benefits to which you are not entitled, regardless of the reason, the law requires that you repay the amount overpaid.

PENALTIES

Any person who knowingly makes a false statement or representation or fails to disclose a material fact in order to obtain benefits or increase the amount of benefits to which he is entitled is subject to penalties specified in the law.

He must repay all benefits received because of such false statement, misrepresentation or failure to disclose a material fact. He may be prosecuted for knowingly violating the law. In addition, he shall receive a decision, after a hearing, causing him to forfeit not less than two weeks nor more than twenty weeks of benefits to which he would otherwise have been entitled.

If you disagree with a decision that you are overpaid or that you are to forfeit weeks of benefits, you may appeal to the Unemployment Commissioner in the manner described under APPEALS, pages 11—12.

EMPLOYMENT NOT COVERED BY LAW

The law excludes the following employment from coverage:

Agricultural labor;

Domestic service in a private home, local college club or chapter of a college fraternity or sorority;

Any employment in Connecticut which is subject to provisions of the Unemployment Compensation laws of another state;

Casual labor not in the regular course of an employer's trade or business;

Newsboys under 18 years of age. (Delivering newspapers to customers.)

Insurance agents, other than industrial life insurance agents, and real estate salesmen, paid solely by way of commission;

Children under 21 employed by a parent and anyone employed by his or her child or spouse are excluded from covered employment and voluntary acceptance is prohibited.

GENERAL INFORMATION

CALENDAR WEEK. The seven-day period which *starts* on Sunday and *ends* on Saturday. All claims are filed on a calendar week basis.

Whenever you make a scheduled visit to the office to file a claim, you are *always* filing a claim for the *calendar week which ended the previous Saturday*. It is important for you to remember this, whether you are scheduled Monday, Friday, or any other day.

TOTAL UNEMPLOYMENT. A week of total unemployment is one in which you have performed no services for which remuneration of

any nature is payable, and you have not engaged in self-employment.

PARTIAL UNEMPLOYMENT. You are considered partially unemployed in any week of less than full-time work in which you earned less than 1½ times your weekly benefit rate.

AVAILABLE FOR WORK. You must be ready, willing and able to take any suitable job on a full-time basis.

IF YOU ARE SICK OR OTHERWISE DISABLED. If you are sick during a week(s), you are not considered to be physically able to work, and may be ineligible for benefits during that period, depending upon the duration of the illness.

REASONABLE EFFORTS TO FIND WORK. Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work.

Be sure you keep your application at the Connecticut State Employment Service active. The Employment Service will assist you in obtaining work but you must also make your own search for work.

When the Employment Service calls you in to discuss job openings, you should go to the office promptly and not wait until your claim appointment. You should be suitably dressed for referral to an employer when you come to the office to discuss a job or to file your claim.

ALWAYS PRESENT YOUR IDENTIFICATION CARD AND CLAIMS BOOK when filing a claim for benefits. Keep them when you return to work for possible use in the future.

HELPFUL HINTS FOR THE JOB SEEKER

Keep your application active at the Connecticut State Employment Service. If you need help in deciding the kind of work to seek, ask for advice—job counseling is available.

Plan your campaign to find a new job. Find out which companies hire workers who do your kind of work. Decide where your best chances are for a job. Go there first.

Take the names and addresses of former employers, dates you worked for them, your social security number, and permits and licenses if required.

Apply in person wherever possible. See and talk to the one who does the hiring.

Your personal appearance is important! Be neat and dressed ready to start work.

When you apply for work, don't take friends, relatives or children into the office with you.

When you have an appointment about a job, keep it and be there on time.

Don't apply during the lunch hour or after working hours.

Be businesslike and brief. Avoid talking about your personal, domestic or financial problems.

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OFFICES OF THE UNEMPLOYMENT COMPENSATION DEPARTMENT

Ansonia	435 E. Main St.	734-3367
Bridgeport	67 Washington Ave.	335-0112
Bristol	59 North Main St.	583-1355
Danbury	64 West St.	743-3841
Danielson	14 School St.	774-8581
Enfield	110 High St.	745-3371
Hartford	90 Washington St.	566-4369
Hartford	2550 Main St.	566-2850
Manchester	806 Main St.	649-4558
Meriden	24 So. Grove St.	235-6374
Middletown	437 Main St.	346-8683
Milford	625 Bridgeport Ave.	878-8377
New Britain	100 Arch St.	223-3611
New Haven	770 Chapel St.	777-4421
New London	170 Bank St.	443-2041
Norwalk	3 Berkeley St.	838-0623
Norwich	1 Railroad Ave.	887-3587
Putnam	50 Canal St.	928-2749
Stamford	1340 Wash. Blvd.	348-7505
Torrington	350 Main St.	482-5581
Waterbury	83 Prospect St.	754-6103
Willimantic	476 Valley St.	423-2521
Winsted	10 Bridge St.	379-2735
Interstate	200 Folly Brook Blvd. Wethersfield	566-4378

Central Office

Unemployment Compensation Department
200 Folly Brook Boulevard
Wethersfield, Connecticut
Mail: Hartford, Connecticut 06115

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LARRY STEINBERG and CECIL PASKEWITZ and DELIA TRIANA and JUAN MIRANDA

v.

JACK A. FUSARI, *Commissioner of Labor*, The Administrator, The Unemployment Compensation Act, State of Connecticut

CIVIL NO. 15,104

JUDGMENT

This action having come on for hearing on the merits before a three-judge District Court, convened pursuant to 28 USC §§ 2281 and 2284, The Honorable J. Joseph Smith, United States Senior Circuit Judge, The Honorable M. Joseph Blumenfeld, Chief Judge, United States District Court, and The Honorable Jon O. Newman, United States District Judge, presiding, and the Court having rendered its Memorandum of Decision, Findings of Fact and Conclusions of Law under date of September 17, 1973, finding that the "seated interview" system as currently used for terminating or suspending the payment of unemployment compensation benefits does not provide minimal due process under the Fourteenth Amendment to the Constitution,

It is ORDERED and ADJUDGED that the defendant Administrator, his successors in office, agents, and employees are hereby enjoined from administering Chapter 567, Conn. Gen. Stat. (§31-222 *et seq.*) in such a manner as to deprive members of the plaintiff class of unemployment benefits without first according them a constitutionally sufficient prior hearing.

Dated at New Haven, Connecticut, this 19th day of September, 1973.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: FRANCES J. CONSIGLIO
Deputy In Charge

MEMORANDUM OF DECISION

(Printed in Jurisdictional Statement, page 1A)

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

(Title Omitted in Printing)

MOTION FOR SUSPENSION OF INJUNCTION PENDING APPEAL

The defendant, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, moves the Court for an order suspending the injunction heretofore granted on September 17, 1973 by a Three-Judge Court of the United States District Court for the District of Connecticut (Smith, Blumenfeld, and Newman) pending appeal or further disposition of this case, on the following grounds:

1. It is impossible for the defendant to devise, in a short period of time, a workable system which will comply with the Court's Order.

2. Since it is expected that many nonrecoverable overpayments will result because of the Order, the defendant, already greatly in debt to the Federal Government, should not be forced into greater insolvency until the United States Supreme Court has had the opportunity to review said Order.

WHEREFORE, the defendant respectfully moves that a suspension of the injunction be granted.

Dated at Hartford, Connecticut, September 24, 1973.

(Signature of Counsel and Certiciation Omitted in Printing)

APPROVED:

J. JOSEPH SMITH
United States Senior Circuit Judge

M. JOSEPH BLUMENFELD
Chief Judge, United States District Court

JON O. NEWMAN
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LARRY STEINBERG, et al

v.

JACK A. FUSARI, *Commissioner of Labor*, The Administrator, The Unemployment Compensation Act, State of Connecticut

CIVIL NO. 15,104

ORDER

NEWMAN, District Judge:

Defendant having moved for a stay pending appeal of the injunction issued by this Court on September 17, 1973, and the motion having been heard on October 1, 1973, before a member of the three-judge court, it is hereby ORDERED that the injunction issued by this Court on September 17, 1973, is stayed pending disposition of defendant's appeal by the Supreme Court, provided that defendant file a notice of appeal with this Court by October 9, 1973, and file a jurisdictional statement with the Supreme Court by November 9, 1973.

Dated: October 3, 1973.

J. JOSEPH SMITH
United States Circuit Judge

M. JOSEPH BLUMENFELD
Chief United States District Judge

JON O. NEWMAN
United States District Judge

Supreme Court of the United States

No. 73-848

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant,

v.

LARRY STEINBERG, et al.

ON CONSIDERATION of the motion of appellee Miranda for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

February 19, 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-848

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant,

-v-

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA, and JUAN MIRANDA,

Appellees,

ON APPEAL FROM A THREE-JUDGE

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF CONNECTICUT

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-848

JACK A. FUSARI, Commissioner of Labor, of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant,

-v-

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA, and JUAN MIRANDA,

Appellees,

ON APPEAL FROM A THREE-JUDGE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the judgment of the Three-Judge District Court, dated September 19, 1973 be affirmed on the following grounds:

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(1) The only substantial issue raised in Appellant's Jurisdictional Statement--the precise form of hearing mandated by the Due Process Clause as a prerequisite to terminating unemployment compensation benefits--is not yet ripe for review by this Court because the Court below has not yet ruled on the issue.

(2) The remaining issues raised in Appellant's Jurisdictional Statement are so insubstantial as to warrant no review by this Court.

OPINION BELOW

The memorandum opinion of the Three-Judge District Court, (Honorable J.Joseph Smith, United States Senior Circuit Judge, Honorable M.Jospeh Blumenfeld, Chief Judge United States District Court, and Honorable Jon O. Newman, United States District Judge) dated September 17, 1973 is set forth in the Appendix to Appellant s Jurisdictional Statement (hereinafter J.S.A.) at pages 1A-25A. The District Court's judgment, dated September 19, 1973 is attached hereto as Appendix A.

QUESTION PRESENTED

1. Whether the Three-Judge District Court correctly decided that the Appellant's procedures for terminating unemployment compensation benefits fail to provide sufficient procedural due

process in light of the Court's findings that Appellant's procedures: (1) Provided virtually no advance notice prior to termination; (2) Provided no opportunity to confront adverse witnesses; (3) Provided no opportunity to consult with counsel; (4) Permitted the fact-finding examiner to go beyond the record of the "seated interview" in making his decision; and (5) Provided a perfunctory statutory citation to persons whose benefits were terminated.

STATEMENT OF THE CASE

Appellees do not take issue with the statement of the case as set forth in the Appellant's Jurisdictional Statement but wish to supplement that statement with the following information.

Unemployment insurance benefits in Connecticut are paid entirely out of a trust fund maintained by the contributions of in-state employers, including interest and penalties. So long as the state program meets federal statutory requirements, its costs of administration are met by the federal government, pursuant to Section 302 of the Social Security Act, 42 U.S.C. Section 502. The Social Security Act requires, inter alia, that states receiving such assistance have methods of administration "reasonably calculated to insure full payment of unemployment compensation when due," 42 U.S.C. Section 502 (a) (1).

The claimant's entry into the unemployment compensation system begins with the filing of a valid initiating claim. The state system of determining initial eligibility is not under attack

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here. After a determination of initial eligibility is made, the claimant is instructed to report bi-weekly to his local unemployment compensation office. Upon reporting, he fills out a "Continued Claim for Unemployment Compensation", upon which he swears to his availability for work and his "reasonable efforts" to find work, among other things. The claimant also fills out a "Continued Claim Work Effort Information Form," when making his bi-weekly visit. He then enters the claims line and eventually presents the completed forms to an employee of the Unemployment Compensation Department. If no questions arise, the claimant is routinely given his benefit checks for the preceeding two-week period.

If the claims line employee raises an issue of possible disqualification, he immediately sends the claimant to another line for a "seated interview". Upon reaching the head of this line, the claimant is interviewed by a "Fact-Finding Examiner", who seeks to ascertain facts as to possible disqualification. If the examiner decides that the claimant is in fact qualified to receive benefits for the period in issue, he simply sends him back to the claims line, and checks are issued. If, however, the examiner decides that the claimant does not meet the statutory criteria for receiving assistance, the claimant is not given his checks, and is told that he will receive written notification of the Department's decision concerning his eligibility for the weeks in question. The written notification is a form letter reciting a perfunctory statutory citation as the basis for disqualification.

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Of necessity, questions will often arise during the "seated interview" which involve third-party information. If such a question arises, the fact finder will attempt to contact the third party while the claimant is present, and will take the information into consideration when reaching a decision. However, if the third party cannot be reached, the claims examiner may still proceed to make his own determination as to eligibility.

The most common reason for the denial of benefits to a claimant is for failure to comply with Connecticut General Statutes, Section 31-235(a), which requires that applicants make "reasonable efforts to obtain work" and be "able" and "available" for work. These statutory requirements account for between 60 and 70 percent of all denials of benefits resulting from "seated interviews". 1/

Once the claimant receives written notice of the fact-finder's decision, he may file an appeal which is heard by an Unemployment Compensation Commissioner. No attack is made in this suit upon

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1/ The Department deviates from its "seated interview" procedure in at least two instances. If an employee of the State Employment Service Department has provided information that a claimant has refused to accept a job referral, notice is sent to the claimant scheduling a hearing for a date and time certain and advising claimant of the reason for the hearing and of his right to bring counsel and witnesses. The claimant then has the right to confront the employer at this hearing. In the routine case, benefits continue until the hearing is held. Similarly, if information concerning the refusal of a suitable job comes from an interested employer - one whose "merit rating"account has been charged because of the termination of the claimant's employment -notice of a proposed hearing is sent both to the claimant and the employer and a procedure similar to the one above is followed.

However, since the majority of cases involve a fact-finder's determination that the claimant has not made reasonable efforts to find work, a pre-termination hearing with the procedural safeguards of advance notice and opportunity to bring counsel and witnesses is the exception rather than the rule.

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the procedures employed at the Commissioners' hearing, except to emphasize the finding of the lower court that in the month of December, 1972, 89.8 percent of all appeals took over 100 days to decide; 61.4 percent took over 125 days; while 29.5 percent consumed over 150 days before the Commissioner's decision. As the lower court noted; "(f)igures from other months strongly suggest that the December figures are not unrepresentative". 2/

A review of the factual situations of three of the named Appellees will serve to put the general background outlined above into sharper perspective. Larry Steinberg had filed a valid initiating claim for benefits in April, 1971, and received weekly benefits through October 9 of that year. On October 27, Steinberg reported to the Unemployment Office for his regular bi-weekly visit, and was directed from the claims line to a "seated interview". After some discussion with a fact-finder, Steinberg was told that he would not receive the two-weekly checks at issue, for alleged failure to use "sufficient efforts to obtain work". Steinberg filed an appeal to the Unemployment Compensation Commission and a hearing was held on January 13, 1972. On May 10, 1972 the Commissioner upheld the Departmental fact-finder. Steinberg did not seek review in the courts.

The second Appellee, Delia Triana had received Unemployment benefits from June 18 through July 8, 1972. On July 24, 1972, she reported to the Unemployment Office in Bridgeport to file for benefits checks covering the preceeding two weeks. Her checks

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2/ See J.S.A., at 18A,n.21 and 22 for a complete table of figures.

were withheld at the claims line and she was directed to a "seated interview", where it was decided that she had not made sufficient efforts to find work for the two periods, and she did not receive her checks. At two subsequent bi-weekly appointments, Mrs. Triana was disqualified from receiving benefits for the period between July 29, 1972 and August 18, 1972 on similar grounds. Mrs. Triana filed a prompt appeal and after a hearing, the Commissioner upheld the denial of benefits for the first two-week period, but held that Mrs. Triana was entitled to benefits for the latter period. The Commissioner's findings of fact included the finding that Mrs. Triana "...was desperate for work and sought all types of work in the local labor market." The Commissioner's decision was not appealed by either side.

A third Appellee, Juan Miranda presents a similar situation. At his "seated interview", in August he was denied benefits on the grounds of having made insufficient efforts to find work. He was notified in September that all claims from August 13, 1972 onward, were disapproved on the above grounds. He filed a prompt notice of appeal; hearing was held on October 17, 1972. On October 24, 1972, the Commissioner held that the benefits from August 13 to the date of the appeal hearing were wrongly withheld. The Department did not appeal.

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ARGUMENT

THE COURT BELOW CORRECTLY DECIDED THAT APPELLANT'S PROCEDURES FOR TERMINATING UNEMPLOYMENT COMPENSATION BENEFITS FAIL TO PROVIDE SUFFICIENT PROCEDURAL DUE PROCESS

Appellant's Jurisdictional Statement characterizes this appeal as presenting broad issues of national importance. J.S., at 3-4. A careful reading of the opinion and judgment of the Court below, however, reveals that this appeal actually presents the narrow issue of whether the Court below correctly decided that Appellant's current procedures for terminating unemployment compensation benefits fail to provide sufficient procedural due process.

In its opinion, the Court below adhered to recent Supreme Court decisions which mandate a two-step inquiry into the type of procedural due process claims raised by Appellees in this case. See generally Board of Regents v. Roth, 408 U.S. 593 at 576-579 (1972); Perry v. Sinderman, 408 U.S. 593 at 599-603 (1972); Fuentes v. Shevin, 407 U.S. 67, at 89-90, n.20 and n.21.(1972). The District Court's first step involved a determination of whether the interest which persons receiving unemployment compensation benefits have in the receipt of those benefits is an interest "encompassed within the Fourteenth Amendment's protection of liberty and property", Roth, supra, at 571 and thereby safeguarded by some form of procedural due process.

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The Court below concluded that Appellees had a sufficient "property" interest to trigger Fourteenth Amendment due process requirement. J.S.A., 19-A. This portion of the District Court's opinion is not open to serious challenge in light of Supreme Court decisions mandating some form of procedural due process safeguards for the following "property" interests; Wages, Sniadach v. Family Finance Corporation; 395 U.S. 377 (1969); welfare benefits; Goldberg v. Kelly, 397 U.S. 254 (1970); reputation, Wisconsin v. Constantieau, 400 U.S. 433 (1971) marriage dissolution, Boddie v. Connecticut, 401 U.S. 371 (1971); driver's license, Bell v. Burson, 402 U.S. 535 (1971); custody rights, Stanley v. Illinois, 405 U.S. 645 (1972); consumer goods purchased pursuant to a conditional sale contract, Fuentes v. Shevin, supra; de facto tenure rights of teacher, Perry v. Sinderman, supra.

The Court below then proceeded to the second step of the inquiry which requires a determination of the "form of procedural due process....necessary to protect the particular 'property' interest involved". J.S.A., 20-A. The Court below did not fully answer this question in its opinion. Instead, the Court limited its ruling to the narrow issue of whether Appellant's current termination procedures provided sufficient procedural due process. The Court below, after examining a large volume of documents, stipulations and other materials introduced as exhibits at the trial, and hearing the testimony of witnesses at the trial, concluded that Appellant's current procedures were not adequate:

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> ....we still think it clear that the 'seated interview' system does not provide sufficient procedural due process. Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact-finding examiner may go beyond the record of the 'seated interview' in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualifications.
> J.S.A., 20-A.

It should be noted that the Court's findings were based on lengthy stipulations submitted to the Court below (J.S.A., 2-A), including stipulations describing the characteristics of Appellant's termination procedures which the Court concluded denied Appellees sufficient procedural due process. See J.S.A., at 2-A, 7-A.

Appellant then does not dispute the District Court's findings but rather urges this Court to hold that the termination procedures meet "minimal due process requirements of the Fourteenth Amendment" J.S.-3, Questions Presented.

A brief review of several of the due process deficiencies noted by the Court below and pertinent decisions of this Court clearly demonstrates that Appellant's current procedures fall far short of minimal due process requirements.

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A. Lack of Advance Notice

The "advance notice" of possible disqualification given claimants under Appellant's current procedures was set forth in stipulations submitted to the District Court and is outlined by the Court at J.S.A., 2A-3A:

> After a determination of (initial) eligibility is made, the claimant is instructed to report bi-weekly to his local unemployment office.....If no questions arise (in the claims line) the claimant is routinely given his benefit checks for the two-week period at issue. If the claims line employee raises an issue of possible disqualification, he sends the claimant to another line for a "seated interview". Upon reaching the head of this line, the claimant is interviewed by a "Fact-finding Examiner", who seeks to ascertain facts as to possible disqualification .....If, however, the examiner decides that the claimant does not meet the statutory criteria for receiving assistance, the claimant is not given his checks....

The claimant, then, first learns of a question regarding his eligibility after reaching the head of the claims line to receive his benefits and must argue for sustaining his benefits "on the spot".

The function of advance notice is to inform the recipient of the nature of the evidence against him in advance of the hearing so that he may have an adequate opportunity to contest its accuracy. Morgan v. Central Hanover Trust Company, 339 U.S. 306, 314 (1950). This Court long ago recognized the importance of advance notice in Roller v. Holly, 176 U.S. 398, 409-410 (1900):

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> It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose...a man should not be required...instantly to answer a charge...on the same or even the next day and should be allowed not only time to obtain legal advice and assistance, but also to collect his evidence, and even the convenience of witnesses should be considered.....

B. No Opportunity To Confront Adverse Witnesses

The Court below noted that, "Of necessity questions will often arise during the 'seated interview' which involves third-party information". J.S.A., 3-A., but claimants are not allowed to confront third-parties supplying adverse information.

Without the historic right of confrontation and cross-examination, a claimant is often powerless to rebut charges made against him for, as this Court recognized in Green v. McElroy, 360 U.S. 474 (1959), the claimants are at the mercy of "individuals whose memory may be faulty or who, in fact, might be perjurers or who are motivated by malice, vindictiveness, intolerance, prejudice or jealousy." Green, supra at 487. See also Goldberg, supra, at 269-270.

Appellant's present termination procedures, therefore, deny recipients advance notice before termination, the right to confront adverse witnesses and other deficiencies in minimum procedural due process set forth at J.S.A., 20-A. Moreover, as noted

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by the Court below, the risk of arbitrary termination of benefits under Appellant's present procedures is enhanced by virtue of the vague disqualification standards[3] applied by fact-finding examiners:

> But when an administrator is making as objective a determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to fairly and completely present his side of the case, and to meet any unfavorable evidence. This the present system does not do. J.S.A., 20-A.

The sole basis for Appellant's appeal rests upon this Court's summary affirmance in Torres v. New York State Department of Labor 408 U.S. 949 (1972). The Court below devoted a major portion of its opinion (J.S.A., 10A-19A) to a discussion of the Torres case and concluded that it was foreclosed from considering Appellees' claims which were based upon the Social Security Act, 42 U.S.C. § 503(a)(1), but was not foreclosed from an independent appraisal of the merits of Appellees' constitutional claim. Whatever the merit of Appellant's claim that this Court should resolve the uncertainty created by its summary affirmance in Torres[4], it is clear that the question of the precise form of hearing mandated by the Due Process Clause in the context of unemployment benefits is not yet ripe for review in the instant case.

3/ Connecticut's statutory disqualification sections for unemployment compensation (Conn. Gen. Stats. §§ 31-235 and 236) are set forth in J.S.A., 26A-27A.

4/ It is significant that the reasoning of the District Court majority opinion in Torres has not been adopted by any other ruling on similar issues. See Wheeler v. State of Vermont, 335 F.Supp. 856 (D.Vt. 1971); Crow v. California Department of Human Resources, 325 F.Supp. 1314 (N.D. Cal. 1970); Hiatt v. Indiana Employment Security Division, 347 F.Supp. 218 (N.D.Ind 1971); vacated and remanded sub nom Indiana Employment Security v. Burney, 409 U.S. 540, 93 S.Ct. 883, 35 L.Ed. 2d 62 (1973); Pregent v. New Hampshire Department of Employment Security, 361 F.Supp. 782 (New Hamp. 1973).

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Appellees urged the Court below to rule that they and members of their class were entitled the same procedural safeguards afforded welfare recipients in Goldberg, supra, but the Court below issued a much narrower holding. The Court declined, at that point, to specify the precise procedures which Appellant was required to implement: "Of course, the choice of methods to bring its procedures into compliance with the Due Process Clause rests with the State". J.S.A., 24-A. Despite the District Court's suggestion that Appellant submit revised termination procedures, Appellant chose to appeal to this Court before the Court below had an opportunity to fashion a final remedy.

Appellees therefore, urge this Court to affirm the District Court Judgment entered below. Presumably, the Appellant will then submit revised procedures to govern the termination of unemployment benefits. If Appellees object to the proposed procedures, the District Court will, possibly after further hearings, fashion a final remedy specifying the precise procedural steps required to satisfy due process. If either party appeals from this subsequent court order, this Court will have the benefit of the District Court's findings of fact and analysis of the revised termination procedures and, if necessary, this Court can then decide the important issue of the form of hearing mandated by the Due Process Clause in the context of unemployment compensation benefits.

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CONCLUSION

For the foregoing reasons, the Court should affirm the Judgment below without argument or further briefing .

RESPECTFULLY SUBMITTED,

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APPENDIX A
MICROFILM
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NEW HAVEN

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FILED
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U.S. DISTRICT COURT
NEW HAVEN, CONN.

LARRY STEINBERG and CECIL PASKEWITZ and DELIA TRIANA and JUAN MIRANDA)
)
v.) CIVIL NO. 15,104
)
JACK A. FUSARI, Commissioner of Labor, The Administrator, The Unemployment Compensation Act, State of Connecticut)

JUDGMENT

This action having come on for hearing on the merits before a three-judge District Court, convened pursuant to 28 USC §§ 2281 and 2284, The Honorable J. Joseph Smith, United States Senior Circuit Judge, The Honorable M. Joseph Blumenfeld, Chief Judge, United States District Court, and The Honorable Jon O. Newman, United States District Judge, presiding, and the Court having rendered its Memorandum of Decision, Findings of Fact and Conclusions of Law under date of September 17, 1973, finding that the "seated interview" system as currently used for terminating or suspending the payment of unemployment compensation benefits does not provide minimal due process under the Fourteenth Amendment to the Constitution,

It is ORDERED and ADJUDGED that the defendant Administrator, his successors in office, agents, and employees are hereby enjoined from administering Chapter 567, Conn. Gen. Stat. (§31-222 et seq.) in such a manner as to deprive members of the plaintiff class of unemployment benefits without first according them a constitutionally sufficient prior hearing.

Dated at New Haven, Connecticut, this 19th day of September, 1973.

Sylvester A. Markowski
Clerk, United States District Court

By: Frances J. Angelo
Deputy In Charge

APPROVED:

United States Senior Circuit Judge

Chief Judge, United States District Court

United States District Judge

Supreme Court, U. S.
FILED
JAN 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-848

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA AND JUAN MIRANDA,

Appellees,

-v-

JACK A FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act.

Appellant

On Appeal From A Special Three Judge Court For The District Of Connecticut

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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Dated January 17, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-848

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA AND JUAN MIRANDA,

Appellees,

-v-

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Appellant

On Appeal From A Special Three Judge Court For The District Of Connecticut

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16(4) and (5), defendant respectfully submits the following in opposition to plaintiffs' Motion to Affirm and to inform the Court of a new decision which is pertinent.

Initially, defendant must deny both of plaintiffs' alleged grounds of their Motion to Affirm:

(1) The *precise* form of hearing mandated by the Due Process Clause is not in issue at all. In fact, when granting defendant's Motion for Stay pending disposition by this Court, the U. S. Dis-

trict Court stated, in part, 'why should the State be forced to institute new procedures before the U. S. Supreme Court decides whether or not its present procedures meet Due Process?'

(2) All of the issues raised in the Jurisdictional Statement are substantial.

ERRORS IN PLAINTIFFS' STATEMENT OF THE CASE

Plaintiffs' statement on page 4 of their Motion to Affirm continues the misleading idea that the letter which is sent to a claimant advising him that he has been disqualified, etc. only recites "a perfunctory statutory citation as the basis of disqualification." The District Court likewise erred in finding this to be the case, because it was stipulated by the parties and cited by the Court itself, J.S.A. 3, that the letter also gives an explanation to the claimant as to the reasons for the decision.

Thus the letter tells him exactly why the decision was made in addition to citing the pertinent statute. This fact is important to note since the Court erroneously cited this as one of the reasons why defendant's procedures fail to provide Due Process.

On page 5 of their motion, plaintiffs again claim that 60 to 70% of all decisions denying benefits is for failure to comply with the "reasonable efforts to obtain work" and "able and available" provisions of § 31-235(a) C.G.S. The District Court also made this finding, although it stated in footnote No. 7 that the defendant had disputed this figure but 'was unable to provide a more accurate figure.' The Court has ignored defendant's statement that it was impossible to produce an accurate figure because statistics were not kept in such a way that this could be done.

In addition to the above errors, the plaintiffs, in their reference to the facts concerning the plaintiff Steinberg, a college graduate, made no mention of the fact that while Steinberg continued to receive benefits, he was warned at prior interviews to improve his efforts to seek work. He was finally disqualified when he failed to heed such warnings. (Plaintiffs' exhibit B [Commissioner's Fact Finding and Decision] attached to original Complaint.)

ARGUMENT

Plaintiffs' claim, and part of the basis of the District Court's finding is, that the defendant's " 'seated interview system' does not provide sufficient procedural due process" because the claimant is not afforded:

(1) Advance notice of the interview or the precise issues involved;

(2) Opportunity to prepare arguments or present witnesses;

(3) Opportunity to confront adverse witnesses;

(4) Opportunity to consult with counsel; and because

(5) The Fact Finder may go beyond the record of the 'seated interview' in making his decision; and

(6) The only explanation a claimant receives is a perfunctory citation of a statute.

Let us examine same:

1) **No Advance Notice**

   a) Of the interview

   b) Of the precise issues involved.

The District Court has completely overlooked the fact that when claimants first apply for benefits, they are given pamphlets which advise them of their rights and obligations. (Paragraph 7 of Stipulation to Facts, Document No. 53 of Record) Likewise, most if not all claimants are given a benefit rights interview explaining their rights. In addition, these plaintiffs collected benefits for varying periods of time, thus they knew what they had to do in order to collect. They also knew that they had to discuss their efforts for the weeks in question with the interviewer every time they reported. (In Connecticut, although payments and determinations of eligibility are made on a week by week basis, the claimants report bi-weekly.) Thus, they knew or should have known that a new determination is made for each and every week for which benefits are claimed, and therefore one could be eligible for one week but ineligible or disqualified for the next.

How else or why should the defendant Administrator give notice of such an interview when the claimant already knows when to report, and knows what happens or can happen when he does report? And how can the defendant give advance notice of the precise issues involved when he does not know (except in job referral cases) what the issue will be until the claimant actually comes in and raises an issue himself by stating what he did or did not do to obtain employment the previous period in question? At the very least, plaintiffs had constructive notice of the interview and the issues.

It should be noted that the Court found, as stipulated, that the defendant does give advance notice in job referral cases when there is time to send same before the next scheduled visit.

2) No Opportunity To Prepare Argument Or Present Witnesses.

Again, what is to prepare? Assuming the claimants are truthful, they simply have to relate what they did to obtain work. They know before the Fact Finder does whether or not verification or corroboration might be necessary. They are free to bring whatever witnesses they wish with them, and, if necessary, they are allowed further time to get the "missing witness" or any written documentation that might be necessary. (Plaintiffs' Exhibit No. 9, Affidavit of E. Smarz, Page 10.)

3) No Opportunity To Confront Adverse Witnesses.

Plaintiffs themselves state that most denials involve questions of "reasonable efforts" and "able and available." Most of these cases do not involve third party information. Thus, in most cases there are no adverse witnesses to be confronted. In those cases where the defendant does receive third party information, the claimant is given ample opportunity to rebut same either orally or in writing, i.e., doctor's certificates etc. By statute, any doubt a Fact Finder may have must be resolved in favor of the claimant. § 31-247 (c) C.G.S. This Court has already upheld, in *Richardson v. Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971), a procedure which lacked the right of confrontation and cross examination of witnesses where the claimant could present reports and testimony in rebuttal of written reports and testimony submitted against him. This holding has been followed in the very recent decision,

December 14, 1973, of the U.S. Court of Appeals for the Ninth Circuit in the case of *Crow v. California Department of Human Resources and Development*, _____F. 2d_____ (1973), (Petition for Certiorari filed _____). In a two to one decision which reversed a District Court ruling, the Court said, page ____, "We find the Constitution to demand here no more than is afforded by the Department's system, (regarding pretermination of unemployment compensation benefits) even though it does not require pretermination confrontation and cross-examination."

4) No Opportunity To Consult With An Attorney.

Here again the District Court erred. Claimants are not prohibited in any way from being represented at such hearings by an attorney. Again, since it is the claimant alone in most cases who knows what issues will be raised when he reports, he should make prior arrangements before reporting to have his attorney with him.

5) Fact Finder May Go Beyond Record of the Seated Interview

Defendant can only assume that what the court meant by this is that the Fact Finder is only searching out all facts which may have a bearing on the issues raised. Since the claimant is given the opportunity to rebut all information which might be adverse, and because any doubt the Fact Finder might have must be resolved in favor of the claimant, defendant submits that this does not constitute a denial of due process. On the contrary, it is one more example of the fairness with which these claimants are treated.

5) Perfunctory Citation Of The Statutes Violated.

As already stated above, the claimant does receive more than a perfunctory citation of the statute he allegedly violated. The decision letter fully explains the reason why the decision was made, and the Court and the plaintiffs are clearly in error on this fact.

'The Issue Is Not Yet Ripe For Review By This Court'

Plaintiffs again err by concluding that the "only substantial issue" is "the precise form of hearing mandated by the Due Process Clause as a prerequisite to terminating unemployment com-

pensation benefits." That is not the issue at all. The issue is whether or not the defendant's *present* procedures meet the minimum requirements of due process. Plaintiffs themselves, page 14 of their Motion to Affirm, cite that the District Court itself did not hold that *Goldberg v. Kelly* standards had to be met. Plaintiffs there cited the Court's statement that ". . . the choice of methods to bring its procedures into compliance with the Due Process Clause rests with the State." The District Court, therefore, deliberately chose not to tell the defendant what procedures had to be foll wed, and the plaintiffs' contention on page 14 that the "Appellant c...se to appeal to this Court *before the Court below had an opportunity* to fashion a final remedy" is clearly unwarranted and erroneous. (emphasis added) The District Court *chose* not to fashion a final remedy.

The real issue, of course, as stated in the Jurisdictional Statement, is whether or not the Court's decision in *Torres v. N.Y. State Department of Labor*, 405 U.S. 949 (1942), is as definitive for unemployment compensation cases as *Goldberg v. Kelly*, 397 U.S. 254 (1970) is for welfare cases. If it is, then the Connecticut District Court erred.

In addition to *Torres*, which defendant submits should be dispositive, there are other unemployment compensation cases to which reference has been made. For the sake of brevity in this document, the following points can only be mentioned, but will be expanded upon in defendant's brief to be filed if jurisdiction is noted. Likewise, our brief will establish not only that unemployment compensation cases must be treated differently from welfare cases, but that the defendant's procedures are essentially fair to the claimant and thus satisfy the requirements of "Due Process".

Goldberg v. Kelly is distinguishable primarily because it is a welfare case. *Wheeler v. Vermont*, 335 F. Supp. 856 (D. Vt. 1971), is distinguishable because Vermont procedures prevented the claimant from presenting his case to the decision-maker. Also, the appeal tribunal in Vermont was a part of the State's Employment Security Division. In Connecticut, the claimant presents his case directly to the Fact Finder who makes the decision, and his appeal is to an independent Commission which is not part of the defendant's Employment Security Division. It should be briefly noted here that the delay by said Commissioners in rendering a decision is a key fact relied upon by the Connecticut District Court. This even though the

Commission, a separate agency, was not a party to this action, and even though admission of the statistics concerning the delay period was timely objected to by defendant as being irrelevant, immaterial and incompetent. It is hindsight, which is not a proper test, to rule a *hearing* inadequate on the basis of what happens *after* the hearing.

Indiana Employment Security Division v. Burney, 409 U.S. 540, 93 S. Ct. 883, 35 L. Ed. 2d. 62 (1973), is a question mark at this time because of this Court's action in sending it back for a determination as to whether or not the case was moot. It could reappear before this Court again so far as defendant presently knows. In addition to that possibility, a petition for Certiorari, as already mentioned above, has been filed in *Crow*. Further, another important unemployment compensation case involving the same issue, *Pregent v. New Hampshire Department of Employment Security et al*, _____ F. Supp. _____ (1973), is "waiting in the wings;" the defendants in *Pregent* will soon file their Jurisdictional Statement. Thus, New Hampshire and California also seek a definitive statement by this Court concerning this issue. Defendant argued unsuccessfully to the Connecticut District Court that this Court's affirmation of *Torres* without memorandum, in conjunction with its remand of *Burney*, should be interpreted as a statement to all that this Court was satisfied with *Torres* as being dispositive in unemployment compensation cases, and that this Court did not want any more of these cases. Whether or not this is true, more of these cases can be expected unless and until this Court actually states its position on this issue.

Defendant respectfully submits that for the above reasons the plaintiffs' Motion To Affirm should be denied, and jurisdiction should be noted by this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, Donald E. Wasik, Assistant Attorney General of the State of Connecticut, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on January 18, 1974, pursuant to Rule 33.3(b) of the Rules of the Supreme Court of the United States, I served a copy of the foregoing Jurisdictional Statement on Raymond J. Kelly, Esquire and John M. Creane, Esquire, by depositing the same enclosed in a sealed envelope, postage prepaid, in the United States mails, addressed to them at their last known address:

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Dated this 18th day of January, 1974.

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Assistant Attorney General
State of Connecticut

Supreme Court, U. S.
FILED
MAY 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act.,

Appellant,

— v. —

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA AND JUAN MIRANDA,

Appellees.

ON APPEAL FROM A SPECIAL THREE JUDGE COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANT

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Appellees.

ON APPEAL FROM A SPECIAL THREE JUDGE COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANT

OPINION BELOW

The decision appealed from is reported in 364 F. Supp. 922 (D. Conn. 1973). A copy of said decision appears in the Jurisdictional Statement, beginning at page 1A.

JURISDICTION

The judgment of the Three Judge District Court was entered on September 17, 1973. The Jurisdictional Statement was filed on November 8, 1973, and probable jurisdiction was noted in this case on February 19, 1974.

The jurisdiction of this Court rests upon 28 U.S.C. 1253. *Torres* v. *N. Y. State Department of Labor*, 402 U.S. 968 (1971); 405 U.S. 949 (1972); 410 U.S. 971 (1973).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal involves the Fourteenth Amendment, U.S. Const.:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The Statutes involved are:

The following Connecticut statutes are set forth in the Jurisdictional Statement beginning at page 26A:

§ 31-235(2)
§ 31-236(1)
§ 31-238
§ 31-241
§ 31-242
§ 31-243
§ 31-274(c)

QUESTIONS PRESENTED

1. Whether the plaintiff's administrative hearing, employing a "seated interview" system, meets minimal due process requirements of the Fourteenth Amendment to the Constitution?

2. Whether the District Court, in determining the constitutionality of Connecticut's administrative hearing, erred in receiving and considering evidence relating to the appeal period which followed the hearing in question?

STATEMENT OF THE CASE

This case involves the adequacy of administrative procedures used to determine weekly claims for Unemployment Compensation.

On June 9, 1972, Larry Steinberg and Cecil Paskewitz brought this action on behalf of themselves and all persons similarly situated seeking injunctive and declaratory relief on the grounds that certain Connecticut statutes provide for the termination or suspension of unemployment compensation benefits in violation of the due process clause of the U.S. Constitution and the "when due" provision of the Social Security Act. On November 13, 1972, the District Court allowed two of twelve intervenors to enter the case as plaintiffs.

On May 18, 1973, counsel for the defendant wrote to the Three Judge Court advising that the defendant had changed his position with regard to claimants such as the named plaintiff Cecil Paskewitz whose termination of benefits was based on monetary grounds only as opposed to non-monetary grounds such as failure to make reasonable efforts to find work, etc. (A.147a) As a result of this, the lower court excluded Paskewitz and others similarly situated from the class represented by the plaintiffs Steinberg, Triana, and Miranda. (Footnote 16, Mem. Dec. J.S. 7A)

Unemployment Insurance benefits in Connecticut are paid out of a trust fund, of which the defendant is trustee, comprised of contributions (taxes), interest, and penalties paid by employers. After an initial determination has been made that a claimant has sufficient wage credits to be eligible for benefits (monetary determination), he is instructed to report bi-weekly to his local Unemployment Compensation Office. There he fills out various forms and is given a booklet entitled "Your Rights and Responsibilities under the Connect-

icut Unemployment Compensation Law." (Def. Ex. C, A.228a and Par. 7 of Stip. to Facts, A.37a) In this booklet, the terms "available for work" and "reasonable efforts to find work" are defined on page 21 (A.250a) as follows:

> "Available for Work. You must be ready, willing and able to take any suitable job on a full-time basis."
>
> "Reasonable Efforts to Find Work. Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work."

Further information is given on pages 3 and 8 of the Booklet (A.232a and 237a) concerning eligibility requirements and the grounds for disqualification. On page 18 (A.247a) seated interviews are discussed and it is stated that such interviews are conducted to:

> "Give you information about your benefit needs;
> Answer your questions;
> Adjust your benefit payments;
> Determine your eligibility for benefits."

The department requires that a claimant be given a benefit rights interview whereby his rights under the Unemployment Compensation Law and his duties are explained.

Each time an individual makes a claim for unemployment compensation, he subscribes to a statement that avers, inter alia, that he was able and available for work during each of the prior two weeks, and that he made reasonable efforts to obtain work during said weeks. Although the claims are filed bi-weekly, benefits are awarded or denied on facts relating to each specific week. Thus, a claimant could be eligible for one of the weeks in question and ineligible or disqualified for the other week. When he reports, he presents a completed statement in which he lists his attempts to find work during

each of the preceding two weeks. Routine questions may be asked, and if no serious doubt exists as to his eligibility, the claimant receives his check and he is told to report again in two weeks unless he finds work. If a question does arise at this time concerning the claimant's eligibility, the claimant is directed to a Fact Finding Examiner for a seated interview. The claimant and Examiner discuss all relevant facts concerning the claimant's entitlement to benefits for the period in question. If requested, the claimant is given an opportunity to obtain and submit additional supporting evidence, written or oral. (Pl. Ex. #9, 51; A. 97a) The Examiner resolves any inconsistencies or contradictions, and departmental policy has been to resolve any doubts in favor of the claimant; this policy is now compelled by statute, § 31-274(c) C.G.S. which states, "(c) The provisions of this chapter shall be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases." (see also lines 16 through 22 on page 45 of Transc. of Proceedings of May 14, 1973, A.203a) If the Examiner determines that the claimant is disqualified for all or part of the period in question, a decision is sent to him advising him of the reasons why he was not entitled to benefits for that period, citing the appropriate statute which applies, and setting forth the manner and time to appeal the decision to an Unemployment Compensation Comissioner.

There are six Unemployment Compensation Commissioners excluding temporary commissioners appointed as needed, who hear such appeals *de novo*. The decision of a Commissioner is appealable to the Superior Court which hears the matter on the record. A further appeal may be had to the State Supreme Court. Collectively, the Commissioners are known as the Unemployment Compensation Commission. The Commission is a completely independent entity separate and apart from the defendant and the Employment Security Division,

and, pursuant to § 31-244 C.G.S., it prescribes its own regulations for the presentation and hearing of appeals.

The named plaintiff, Larry Steinberg, filed a claim for benefits in April of 1971, and received benefits for 26 weeks at $82.00 per week through October 9, 1971. On October 27, 1971, he reported again and was given a seated interview by a Fact Finding Examiner.

> "He told the Examiner that except for an inquiry at Brand Rex in May, 1971, all his efforts to obtain work had been through the hiring halls of the Ironworkers' Union. In the week ending October 23, he had gone to the hall of Local 37 in Providence and had telephoned to Local 424 in New Haven and Local 15 in Hartford. He stated that he would accept only Union work. He is not a union member but can work on a permit only after all union card holders who want work are placed." (¶ 8 of Ex. B of Orig. Comp., A. 8a)

Compensation was denied for the weeks ending October 16, and 23, 1971, by a written decision mailed on November 1, 1971, setting forth the reasons for the decision and notifying him of his right to appeal. He did appeal on November 5, 1971. (He secured employment commencing November 22, 1971.) The Unemployment Compensation Commissioner scheduled his appeal for hearing on December 2, 1971, but granted Steinberg's request for a continuance, as a result of which the hearing was not held until January 13, 1972. After a full *de novo* hearing, the Commissioner affirmed the Examiner's decision finding, inter alia, that Steinberg ". . . was given not one but several hearings on his benefit eligibility status . . .", that he ". . . had every opportunity to present information favorable to his version of the facts in his situation . . .", and that "On August 24, he was again seated and interviewed by an examiner who told him he must expend (sic) the scope of his efforts to find work, which up to that time had been mainly

to telephone or go to Locals 37 and 424 of the Iron Workers Union." (Par. 33 of Stip. to Facts, A.42a) Steinberg did not appeal to the Court. Steinberg, again out of work on December 23, 1971, filed a partial claim for the week ending December 25, 1971 and was paid $53.00. He then filed claims and was paid for subsequent weeks at the rate of $82.00 per week.

Delia Triana filed claims for and received benefits from June 12 through July 8, 1972. On July 24, 1972, she had a seated interview. As a result of her testimony at that hearing, a determination was made that she had not made sufficient efforts to find work in either of the two prior weeks. She also failed to meet the eligibility requirements at her next two bi-weekly appointments. She appealed to the Commissioner who, after a hearing, affirmed the Examiner's decision as to the first two weeks in question, but reversed his decision as to the subsequent period. This decision was not appealed.

Juan Miranda filed for and received benefits from July 2 through August 12, 1972. On or about August 30, 1972, he had a seated interview. As a result of factual information he himself provided, a determination was made that he had failed to make reasonable efforts to obtain work during the two weeks ending August 19 and August 26, 1972. He too, was sent a decision-letter advising him of the determination, explaining the reason why, and informing him of his right of appeal. He did appeal, and the Commissioner sustained his appeal. No appeal was taken from the Commissioner's decision.

Plaintiffs claim they were denied due process of law and that defendant's procedures violated the "when due" provision of the Social Security Act. The Three Judge Court for the District of Connecticut found no violation of the Social Security Act, but enjoined the defendant from following the hearing procedures in question on the grounds that said procedures failed to meet due process requirements of the Constitution. Pending disposition of this appeal by the Supreme

Court, the Three Judge Court has stayed the operation of the injunction.

SUMMARY OF ARGUMENT

Under Connecticut's Unemployment Compensation Law, a claimant, after meeting requirements necessary for a valid initiating claim, reports every two weeks at a local office to establish his eligibility for each of the two weeks just ended. Claimants are apprised by various means, including a booklet explaining their rights and obligations, as to what they must do to be eligible for each week they claim benefits. It is possible to be determined eligible for just one of the two weeks in question, and it is possible to be determined eligible for weeks immediately subsequent to a week for which benefits were denied.

When a claimant arrives at the local office he presents himself to a department employee. If no question of eligibility exists, he is paid. If a question does exist, he is referred immediately to a Fact Finding Examiner who interviews him at length. In most cases, all relevant facts are elicited from the claimant himself. If third party information is a factor, the claimant may or may not have advance notice of same, and he may or may not be able to confront the third party; this depends upon certain circumstances. The claimant is given every opportunity to rebut adverse information and allegations, and is given an opportunity to obtain supporting evidence of any kind. It is the adequacy of this hearing procedure which is at issue.

In ruling that defendant's hearing procedures deny plaintiffs due process because of certain inadequacies, the lower court cited such cases as *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *Sniadack* v. *Family Finance Corporation*, 395 U.S. 337 (1969).

This Court recently held in *Arnett* v. *Kennedy*, ____ U.S. ____, 42 U.S.L.W. 4513, 4519, (April 16, 1974), however, that such cases

> ". . . deal with areas of the law dissimilar to one another . . . The types of . . . 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests."

What due process requires in one case, therefore, may be wholly unsuited to another. The concept takes on meaning only when it is considered in the context of a particular statutory framework. It is not one of fixed context unrelated to time, place and circumstance. *Cafeteria & Restaurant Worker's Union* v. *McElroy*, 376 U.S. 886 (1961).

> "The hearing required by the Due Process Clause must be 'meaningful', *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), and 'appropriate to the nature of the case'. *Mullane* v. *Central Hanover Bank & Trust Co.*, supra, at 303". *Bell* v. *Burson*, 402 U.S. 535, 541 (1971).

Defendant's procedures are fair to the claimant: (1) he has adequate notice; (2) he presents his claim directly to the person who makes the determination as to eligibility for the two weeks just ended, and he can bring witnesses, representation of any kind, and any type of corroborating evidence; (3) the claimant is given the opportunity to rebut any adverse information or allegations which might be brought out; (4) he has an opportunity to consult with an attorney since he alone in most cases knows whether or not he is fulfilling the eligibility requirements during the current two weeks for which he seeks benefits; (5) if he is denied benefits as a result of the facts elicited at this hearing, he

is sent a decision-letter giving the reasons for this denial and giving him information regarding appeal.

Procedures similar to this were upheld in *Torres*, and summarily affirmed by this Court. Defendant's procedures go even further than the procedures in *Torres* because in certain instances advance written notice is given claimants, and because Connecticut has a statutory presumption in claimant's favor.

The lower court determined that it had to follow *Torres* with regard to the statutory question, and therefore ruled there was no violation of the 'when due' provision of the Social Security Act. It declined following *Torres* on the constitutional question, however, on the dubious ground that Connecticut's factual situation was different. The Connecticut factual situation to which the court referred, however, was information pertaining to the statutory question: The greater time period which elapsed between the date a claimant appealed an administrator's decision and the date a decision thereon was rendered by an appeals commissioner, one who is separate and apart from the defendant. Such "evidence" is irrelevant, immaterial and incompetent hearsay, and was entered over defendant's objections. In drawing the "factual distinction," therefore, the lower court did not base its decision on any differences between New York's and Connecticut's hearing procedures. Instead, it went off on a totally extraneous tack and it drew a distinction based on time lapses which were subsequent to the conclusion of the hearing procedures invoked here and which were caused by one other than this defendant. The lower court was no doubt swayed by this prejudicial evidence, and erroneously concluded that defendant's procedures failed to afford claimants due process of law.

Because the lower court relied upon objectionable evidence, and erroneously concluded that defendant's pro-

cedures lacked due process, this Court should follow *Torres* and reverse the lower court.

ARGUMENT

I. CONNECTICUT'S PROCEDURES AFFORD DUE PROCESS.

A. The Three Judge Court Attempted to Distinguish Torres v. N.Y. State Department of Labor[1].

The lower court has followed *Torres* in ruling that Connecticut's procedures do not violate the Social Security Act. It has failed to follow *Torres* on the constitutional question, however, for one basic reason: "The factual situation of the Connecticut client is sufficiently different from that of the New Yorker to require a different result". (Mem. Dec. 18, J.S. 17A). The factual situation to which the court referred concerns the average time lapse between the date an appeal to a commissioner is filed and the date the commissioner's decision is reached. The court accepted evidence of such time periods over defendant's objections. (pp. 4a and 5a Portion of Transc. of Proceedings of May 14, 1973, A.154a and 155a; and p. 42 of Transc. of Proceedings of May 19, 1973, A.200a) Because the average time lapse was greater in Connecticut than in New York, the lower court held, ". . . the *Torres* affirmance does not foreclose an independent appraisal of the merits of plaintiffs' constitutional claim". (Mem. Dec. 19, 20, J.S. 19A). (The court also mentioned that Connecticut did not have an Aid for Dependent Children - Unemployed Parents Program, but did note the availability of "Town" assistance in Connecticut.) The key reason for the lower court's refusal to follow *Torres*, therefore, is its reliance on irrelevant evidence, entered over objection, concerning matters solely within the jurisdiction

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[1]405 U.S. 949 (1972)

of the Unemployment Compensation Commission, and which never should have been admitted and considered by the court. (Defendant will state his reasons below why the court erred in receiving and considering such evidence.)

The lower court then made a two-part inquiry into the merits of plaintiffs' due process claim. The first question was whether the plaintiffs have a sufficient "property" interest in the receipt of unemployment compensation. In its brief discussion on this point, the court cited a few cases, none concerning unemployment compensation. One case where this point might have been raised is *Sherbert* v. *Verner*, 374 U.S. 398 (1963). That case, however, determined only that South Carolina's denial of unemployment compensation benefits to a claimant who refused to apply for or accept work on Saturday because of religious beliefs imposed a burden on the Free Exercise Clause of the Constitution. This court stated, page 409,

> "Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. . . . Finally, nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest".

Mr. Justice Douglas in his concurring opinion said, page 412,

> "This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples".

"*Sherbert*, said the *Torres* court, page 437, has no application to the situation presented in the present case".

Most recently this Court has had occasion to consider a "property" argument in a case concerning removal procedures of a non-probationary federal employee. After citing many of the cases mentioned by the lower court in this case such as *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *Bell* v. *Burson*, 402 U.S. 535 (1971), and *Sniadack* v. *Family Finance Corporation*, 395 U.S. 337 (1969) this Court said,

> "These cases deal with areas of the law dissimilar to one another and dissimilar to the area of government employer-employee relationships with which we deal here. The types of . . . "property" protected by the Due Process Clause vary widely, and what may be recognized under that clause in dealing with one set of interests which it protects may not be recognized in dealing with another set of interests". *Arnett* v. *Kennedy*, ____ U.S. ____, (No. 72-1118, 42 U.S.L.W. 4513, 4519, April 16, 1974).

Unemployment compensation is also dissimilar, and a decision factually denying unemployment compensation cannot create a property right to such benefits.

Unlike *Goldberg* v. *Kelly*, supra, and *Java* v. *California Department of Human Resources Development*, 402 U.S. 121 (1971), this is not a case where benefits, once granted, are abruptly suspended or terminated. This distinction is a critical one. The claimants in this case are not "recipients" of benefits for the weeks in question. Nor is it appropriate to say that the claimants are "deprived" of benefits. That word connotes a withholding of something to which an individual is entitled; there is a pejorative nuance to that word, a whiff of injustice. But there is no injustice here. No one is being "deprived" of anything to which he is entitled. It is

the very issue of entitlement which is in question here. The correct characterization of the issue is whether the procedures used to grant or deny benefits for a particular weekly claim meet due process requirements.[2]

Each time a claimant seeks benfits for a particular week he is, in effect, making a separate claim. He must demonstrate that he has looked for work, that he has not refused work, that he has been able to and available for work, and he must disclose whether he received any form of income. The facts as to each of these determinations will vary from week to week. As the *Torres* court recognized, these determinations will be based on "new factual circumstances which could not have been considered at the original eligibility interview". (333 F. Supp. 341, 344, 1971)

The point is that an individual does not have a continuing right to benefits simply because he has survived the *initial* coverage and wage credit determinations. There is no outstanding decision of entitlement as was present in *Java* and *Goldberg*. Each week the claimant must make an affirmative showing. His claim for that week is either granted or denied; there is no "termination" or "suspension". The fact that he continues to make weekly claims over a period of time gives him no special status, no property right in benefits for any one week or any series of weeks. Thus, *Goldberg* and *Java*, where the claimants had their benefits cut off while the outstanding decision was that they were eligible are not apposite here, and the lower court erred in determining that these plaintiffs have a property right which is protected by the Due Process Clause. Indeed, it could be this lack of a such property right which was the basis of this Court's affirmance of *Torres*.

The second part of the court's inquiry concerned the form of procedural due process necessary to protect the

[2]As the court below ruled that there is no violation of the Social Security Act in this case, we have restricted our examination to the due process issue.

particular property interest involved. The court then stated its reasons why the defendant's seated interview system does not provide sufficient procedural due process.

B. Connecticut's Procedures Are Fairer Than The Procedures Upheld In Torres.

As a practical matter, we believe the lower court had difficulty distinguishing *Torres* because the similarities between the New York procedures (which were found adequate by this Court) and the Connecticut procedures are remarkably close. Let us first examine the administrative machinery available to the claimants in *Torres*. The first Three Judge *Torres* decision, 321 F. Supp. 432 (S.D.N.Y. 1971), set forth in some detail the manner in which claims are decided. Essentially, the claimant is interviewed concerning his efforts to find work, etc. and is given the opportunity of explaining any information which may appear to be inconsistent with his version of the facts. After the claims examiner has weighed the evidence and heard the claimant, a decision on eligibility for the week in question is made.

In *Torres*, one of the plaintiffs was an individual named Dinger. Like the claimants in this case, Dinger was denied benefits because the examiner concluded his search for employment was inadequate. The *Torres* court, in its decision on remand from this Court, described what happened,

> "After receiving ten benefit payments, Dinger was interviewed at an insurance office about his availability for work. On the basis of information Dinger supplied in response to questions, and on the basis of newspaper listings of available jobs, the interviewer determined that Dinger was ineligible to continue to receive benefits because he had not demonstrated 'an active, realistic and diligent search for work'. The benefits

were suspended on the basis of new factual circumstances which could not have been considered at the original eligibility interview. The *Java* decision is therefore irrelevant to plaintiff Dinger: not only was the eligibility redetermination based on new facts, but the plaintiff supplied the insurance office with those very facts at an administrative interview". (333 F. Supp. 341, 344) (S.D.N.Y. 1971)

The Connecticut procedures and the facts of the plaintiffs here bear a striking similarity to those in *Torres*. A careful review of the Connecticut procedures reveals that Connecticut is even more vigilant in protecting a claimant's rights than is New York:

(1) *The Claimant has adequate notice.*

The lower court in this case erroneously concluded that, "Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf". (Mem. Dec. 21, J.S. 20A) The fact is, however, the department usually learns of the problem only when the claimant presents himself at the office and offers facts concerning his eligibility. The claimant knows two weeks in advance when he is next to report. If there is a problem concerning his search for work, he will surely know it before he even steps into the office.

Claimants are not totally unsophisticated in these matters nor are they ignorant of their obligations. The claimants in this case had been receiving benefits for many weeks. They had answered the same questions, and clearly knew what was required of them. It is unrealistic and naive to assume, as did the District Court, that questions concerning weekly claims come as a complete surprise to the claimant. Nor is there any mystique about what a claimant must do to

qualify. When he applies for benefits, the claimant receives the booklet entitled, "Your Rights and Responsibilities Under the Connecticut Unemployment Compensation Law". (¶ 7 of Stip. To Facts, A.37a) Included in this booklet is the admonition,

> "You must be ready, willing, and able to take any suitable job on a full-time basis",

and

> "Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work". (Def. Ex. C, 21; A. 250a)

Moreover, the booklet also describes the purpose of the seated interview, indicating that such interviews are conducted to:

> "Give you information about your benefit needs; Answer your questions; Adjust your benefit payments; Determine your eligibility for benefits". (Def. Ex. C, 18; A. 247a)

The fact that the defendant gives advance notice to claimants such as Paskewitz (monetary determination only) and to claimants who have allegedly refused a job referral, does not mean that the defendant must necessarily do likewise for all claimants. All claimants are afforded due process by defendant's procedures, and simply because different administrative procedures might be used regarding some claimants cannot change this. The mere fact that such administrative differences might be considered better, cannot mean that those who do not receive them are thereby denied due process. Put another way, just because one does something, which he does not have to do, for one person, does not mean that by so doing he necessarily must do the

same for everyone. There is, of course, also the practical reason for the difference in handling these claims, namely that the defendant is able to give advance notice in those cases because he himself has advance notice, whereas it is impossible for him to do this in all other cases because he does not know if a possible problem exists until the claimant actually comes in and tells his story.

(2) *The claimant has an opportunity to present his case.*

Again, the District Court was incorrect in stating that the claimant was barred from presenting witnesses or appearing with counsel. If the claimant knows that his work search may present a problem, he may bring witnesses with him; he may bring counsel or a union representative or anyone else he believes will be of assistance to him. He may bring documents, letters, virtually anything. If he needs time to obtain relevant evidence, he will be given this opportunity. (Pl. Ex. #9, 51; A. 97a)

In this regard the District Court has created the impression that somehow there is a presumption against the claimant, that someone is trying to trap him or short circuit his rights. Nothing could be further from the truth. Indeed, in Connecticut the claimant is armed with a presumption in his favor. § 31-274(c) C.G.S. states,

> "The provisions of this chapter shall be construed, interpreted and administered in such manner as to presume coverage, eligibility, and nondisqualification in doubtful cases".

(3) *The claimant may rebut unfavorable evidence.*

In most cases, the claimant supplies the information himself and, based on the claimant's own account, the Examiner may grant or deny benefits. In a few cases, an inquiry is initiated because a third party has submitted information which raises a question of entitlement. Should this happen, the claimant is notified as soon as possible. Advance written notice advising the claimant of the issue and his right to bring representation and witnesses is sent in all cases except those where the claimant is already scheduled to appear within two days. In such cases, claimants have the opportunity to confront the Employment Service employee who has provided information which might cause a denial of benefits. (Affid. of T. W. Hatcher, A. 150a) (The Employment Security Division of the Connecticut Labor Department is comprised of both the Employment Service and the Unemployment Compensation Department.)

When information of an alleged job refusal is supplied by a prospective employer who is not an interested party, no notice is sent to that employer because he has no real interest in the results. In that situation there is no opportunity for confrontation by the claimant. In many such instances the Examiner will telephone persons who may have relevant information. The calls are made while the claimant is being interviewed so that he can comment, deny, or explain. In those instances where the Examiner cannot reach the third party while the claimant is present, he will call again later that day if possible. The Examiner will then base his decision on all relevant facts including factors bearing on credibility, and will be mindful of the statutory presumption in favor of the claimants. This lack of opportunity for confrontation is not sufficient to constitute a violation of due process because each claimant is given every opportunity to rebut adverse allegations, and because by statute the claimant is given the benefit of any doubt which may exist. Further, it would be impossible to require a prospective employer who is not an interested party to be present at such a hearing. Although the claimants are required to be registered with the Employment Service in order to be eligible for benefits, employers register only on a voluntary basis. Such employer registration

is vital if the Employment Service is to obtain jobs for the unemployed. If such employers were forced to send personnel to hearings when they have no interest at stake, they simply would not register. The disastrous effect this would have on the Employment Service is obvious. The greater good would be served, therefore, as compared with the probable damage to the Employment Service and that part of the program aimed at getting the unemployed back to work, by allowing the defendant to continue the procedures now followed.

This Court has already upheld, in *Richardson* v. *Perales*, 402 U.S. 389, (1971), a procedure which lacked the right of confrontation and cross examination of witnesses where the claimant could present reports and testimony in rebuttal of written reports and testimony submitted against him. This holding has been followed in the very recent decision, December 14, 1973, of the U.S. Court of Appeals for the Ninth Circuit in the case of *Crow* v. *California Department of Human Resources and Development*, 490 F. 2d 580 (1973), (Cert. filed, No. 73-1015, ____ U.S. ____ 42 U.S.L.W. 3388, Dec. 28, 1973). In a two to one decision which reversed a District Court ruling, the court said, page 584, "We find the Constitution to demand here no more than is afforded by the Department's system, (regarding pretermination of unemployment compensation benefits) even though it does not require pretermination confrontation and cross-examination".

(4) *Claimant does have an opportunity to consult with an attorney.*

Here again the District Court erred. Claimants are not prohibited in any way from consulting with or being represented at such hearings by an attorney. There is no evidence whatsoever that the plaintiffs Steinberg, Triana, or Miranda even attempted or requested permission to bring an attorney to any of the local office hearings. Nor is there any statute or

regulation prohibiting such representation. True, the lower court speaks of "opportunity" to consult with an attorney as opposed to any "right" to representation. However, since it is the claimant alone in most cases who knows in advance what issues will be raised when he reports, he does have an opportunity to consult with an attorney and to then have him present when he reports if he so desires. See *Allen* v. *City of Greensboro, North Carolina*, 452 F. 2d 489 (4th Cir. 1971).

(5) *Claimants are told why benefits are denied.*

The lower court found as one of its reasons why defendant's procedures denied due process that ". . . the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification". (Mem. Dec. 21, J.S. 20A) This is obvious error since it was stipulated by the parties and cited by the court itself that the decision-letter states the reasons for the decision. (Mem. Dec. 3, J.S. 3A) Thus, the claimant is told exactly why and on what statutory basis the decision is made.

C. The Named Plaintiffs Have Not Been Harmed by Defendant's Procedures.

Even if it were possibile for the defendant to have known in advance what issues were to be raised at the seated interview of plaintiffs Steinberg, Triana, and Miranda, the same result would have occurred in each case. Steinberg, a college graduate, was denied benefits on the grounds that he had restricted his availability for work and because he had failed, even after being warned, to make reasonable efforts during the period in question. Triana and Miranda were both denied benefits because they had failed to make reasonable efforts. The decision made by the Fact Finding Examiner in each case was based on he facts, which facts were obtained solely from each claimant. There were no witnesses to be confronted and no cross-examination

was necessary. Thus, the only facts necessary for a determination of weekly eligibility were, as in most cases, elicited solely from the claimants themselves. And it should be noted that these plaintiffs did not appeal to the Superior Court the factual determinations of the Commissioners denying eligibility.

D. The Torres Decision Should Be Followed Rather Than Goldberg v. Kelly, Supra.

(1) *Goldberg* v. *Kelly* is distinguishable.

Plaintiffs placed great reliance on *Goldberg* in their presentation of this case before the lower court, and, although the lower court did not order the defendant to comply with all the requirements of that case, it is obvious that the *Goldberg* decision greatly influenced the lower court's rationale. This case is distinguishable, however, in a number of respects.

First, of course, *Goldberg* is a Welfare case whereas *Torres*, like this case, concerns Unemployment Compensation. In *Goldberg*, the "brutal need" of the claimants was of key importance. This is set out in the opinion in unequivocal terms:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'..."

397 U.S. at 263. The claimant's "brutal need", noted by the lower court, was the fulcrum on which this Court based its holding. But need is not relevant to a determination of eligibility for unemployment insurance benefits.

> " 'Unemployment compensation is greatly preferable to relief because it is given without any means test.' H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935). "Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis but only while the worker is involuntarily unemployed. 'H.S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935).' " *Torres*, supra, p. 437.

The difference between welfare and unemployment insurance with respect to need was pointed out by a noted authority who stated,

> ". . . *public assistance* programs provide benefits according to individual and demonstrated budgetary needs and are usually financed from so-called general revenues, i.e., tax impositions of the direct or excise type without particular connection between the class of taxpayers or transients benefited by the program. *Social insurance*, on the other hand, is characterized by benefits which are payable without proof of need and is usually financed, at least in part, by either the prospective beneficiaries themselves or a class of taxpayers upon whom these beneficiaries are economically dependent or both . . ."

Riesenfeld, *The Place of Unemployment Insurance Within the Patterns and Policies Of Protection Against Wage Loss*, 8 Vand. L. Rev. 218, 223 (1955). The distinction is of considerable importance since a delay of payments in a program predicated primarily on need may be intolerable while less protracted delays under other programs where need is not strictly relevant may be within constitutional limits.

Thus, the "crucial factor" of need which was dispositive in *Goldberg* cannot have the same impact in deciding the question of due process in unemployment insurance cases. While we cannot ignore the fact that some unemployment insurance claimants are in fact needy, we must recognize that unemployment insurance is available to rich and poor alike,

and hence it is illogical to permit the right to benefits to be accelerated in direct relation to the severity of a claimant's economic situation.

Second, the claimant in *Goldberg* had no opportunity to personally present his case to the one who made the decision; he could not confront witnesses if there were any. This failure of the New York procedures, said the Court, "was fatal". In our case, not only did the plaintiffs personally present their case to the one who made the decision, but it was their own statements which, based upon their own efforts or lack of efforts to find work, constituted the information upon which the Examiner made his decision. Each of the named-plaintiffs had already collected benefits before payments were denied. (Plaintiff Steinberg had successfully presented his claim 13 times and received unemployment compensation for twenty-six separate weeks!) Thus, the two key elements of *Goldberg* are missing here: Need is not a determinant, and the plaintiffs not only had the opportunity to personally present their case to the decision-maker, but *had* to.

(2) Unemployment Compensation differs from Welfare.

An application for unemployment insurance benefits involves not only the claimant and the state, but the private employers who fund the program. The money to pay benefits does not come from general tax revenues but from an identifiable segment of the population (employers) which is required to make contributions into a reserve fund to pay benefits. Because of this method of funding the program, the state does not have the same direct interest it has in the welfare situation where every dollar the state saves may be available for other programs which compete for state funds. In the unemployment insurance area, the state is basically neutral since it cannot use the unemployment insurance fund for other state purposes, but must simply insure that sufficient money is available in the fund to pay eligible claimants.

Further, this is a trust fund, and the defendant-administrator, as trustee, must therefore be looked upon as a fiduciary in administering it. And, as this Court recognized in *Java*, supra, p. 134, the role of the examiner is that of a neutral party. Contrary to plaintiffs' claims, these hearings are quasi-judicial so far as the defendant is concerned, and the defendant is not an adversary of either the claimant or the employer. The mere fact that Connecticut law (§ 31-248) requires the defendant to be deemed a party in all judicial appeals cannot change this.

In making a claim for unemployment compensation, an individual's actions are examined afresh each week. His weekly claims are separate and distinct claims, dependent on facts and behavior which vary from week to week. Therefore he is not continuously entitled to benefits over a period of weeks. Each week a claimant must meet the criteria established by the Connecticut Legislature for entitlement to unemployment compensation. This is in complete contrast to the welfare system. Welfare recipients, once found eligible, are presumed eligible. Although they have a duty to report any changes in their circumstances, they have, with limited exceptions, no duty to effect such change. Even exceptions such as work incentive programs, contemplate a long-term program of training for employment. Moreover, such recipients receive these benefits primarily because of the permanency of the basis of their needs such as old age, blindness, and permanent physical or mental disability. Unemployment Compensation on the other hand is designed to be only a temporary measure.

Also, unlike welfare recipients, the unemployment benefit claimant has an affirmative duty to attempt to secure employment. Each week he must demonstrate the realistic nature of that search, disclose whether he in fact worked, disclose whether he received any form of income, and whether he was physically able to work. Eligibility is a recurring ques-

tion. Ineligibility for one week does not presume subsequent ineligibility any more than a finding of eligibility for one week presumes eligibility for subsequent weeks.

The class members here are persons who have filed claims and have been collecting. The procedures were wholly familiar to them. The plaintiff Steinberg, for instance, knew he was required to perform the affirmative acts described supra. There was no question of adequate notice involved when he was again given a seated interview on October 27, 1971. He knew very well he would be called upon to explain his search for work, and he had been warned previously to improve his work search. (¶ 7, of Ex. B of Orig. Comp., A 8a) He had ample opportunity to consult an attorney about this, and could have brought an attorney with him on October 27, 1971. Because of his failure to expand his efforts to find work, Steinberg was denied benefits. Similarly, the plaintiff Triana was given benefit rights interviews on both June 27 and August 8, 1972 by a Spanish speaking department employee who also acted as interpreter for her on July 24, 1972. (Affid. of P. Collazo, Def. Ex. B; A. 145a)

E. Plaintiffs Were Afforded Due Process Of Law By Defendant's Procedures.

It is obvious from the number of plaintiffs' Exhibits, both in the lower court and in the Single Appendix, especially their Exhibits 14 through 29o which are comprised of various letters or bulletins from the defendant to local office employees, that the defendant goes to great lengths to maintain its already fair and adequate procedures. As this Court can see, these letters are generally informative and instructive, and their purpose is to guide and assist these employees in properly performing their duties and coping with various problem situations which may have arisen. They support defendant's

averment that everything possible is done to treat all claimants as fairly as possible. And fairness is really what due process is all about. ". . . the rudiments of fair play . . . are the essence of due process of law . . . ." *Kelley* v. *Metropolitan County Bd. of Ed. of Nashville & Davidson County, Tennessee*, 293 F. Supp. 485 (M.D. Tenn., 1968)

The essential elements of due process necessary for a fair and impartial determination do not require a full adversary, court-type hearing prior to such determination whether it results in the payment of benefits or not. Due process is not a brittle concept incapable of bending to accommodate differing factual circumstances. What due process requires in one case may be wholly unsuitable to another. The concept takes on meaning only when it is considered in the context of a particular statutory framework. It is not one of fixed context unrelated to time, place and circumstance. *Cafeteria and Restaurant Workers Union* v. *McElroy*, 376 U.S. 886 (1961).

> "The hearing required by the Due Process Clause must be meaningful.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), and 'appropriate to the nature of the case.' *Mullane* v. *Central Hanover Bank & Trust Co.*, supra, at 303" *Bell* v. *Burson*, 402 U.S. 535, 541, (1971).

And in discussing notice, this Court said in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, (1950),

> "But if with due regard for the practicalities and peculiarties of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' *American Land Co.* v. *Zeiss*, 219 U.S. 47, 67; and see *Blinn* v. *Nelson*, 222 U.S. 1, 7."

This Court went on to say, p. 319,

> " 'Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done.' *Blinn* v. *Nelson*, supra, 7."

Defendant cannot emphasize strongly enough that justice was done in the cases of the named plaintiffs.

Due process is a rule which seeks to achieve a balance between legitimate state interests[3] and rights of individual citizens. In *Goldberg* the Court found that the state interest did not justify the procedures employed or, in other words, that the balance was lopsided in favor of the State Welfare Department. The welfare recipient in *Goldberg* had no notice that his interests were being decided, no opportunity for a personal appearance or meaningful presentation of evidence or arguments, and no opportunity to rebut charges against him. (397 U.S. at 259)

This case is much different. Here the claimants did have notice, constructive notice at the very least, by virtue of the following: the provisions of § 31-235(2) C.G.S., the booklet concerning rights and responsibilities of claimants, the benefit rights interviews, claimant's own experience in reporting bi-weekly, and being scheduled for a specified day and time. Certainly experienced claimants such as these know in advance whether or not they are meeting or have not met the eligibility requirements for the latest two weeks. This same advance knowledge, by the claimant alone, provides him the opportunity to prepare any argument or present witnesses he deems necessary. He states his case personally to the person who makes the decision, and is given every opportunity to rebut any adverse allegations. He is allowed time to obtain rebutting or corroborating testimony, oral or written.

[3]"State interests" may be a misnomer as applied to the instant situation since, the state is acting as a neutral fiduciary rather than an adverse party.

The argument that the claimant must have the right to physically confront and cross-examine adverse witnesses and that no substitute procedure is adequate to satisfy due process is simplistic and ignores the practicalities of administering the program. Not only is there simply no adverse witness to confront in most cases, but the fact is that the department never decides a case without giving the claimant a full opportunity to not only air his own views concerning relevant facts, but also to rebut and controvert any conflicting views offered by other persons. Little is gained by slavishly adhering to labels such as "cross-examination" or "right to confrontation." The point is not whether one individual is physically present to confront another individual. The real object is to make sure that the decider of facts has enough information from both sides to make a fair decision. It is submitted that the current procedures satisfy this principle. Again, the same advance knowledge provides the claimant with the opportunity to consult an attorney. And the right to representation at the hearing is not limited to an attorney. It is not uncommon for the claimant to appear with a relative, friend, co-worker, interpreter, or union representative. The Examiner discusses all relevant points and attempts to resolve all areas of conflict.

In making his decision, he is guided by the statutory presumption in favor of the claimant where doubt exists. If anything, this procedure is weighted in favor of the claimant.

In *Java*, supra, this Court struck down procedures whereby unemployment compensation benefits, after initially being awarded, were withheld upon the filing of an appeal by the employer. In discussing with approval the type of hearing

given when such benefits are first administratively allowed, the Court stated, at page 134,

> ". . . the eligibility interview is informal and does not contemplate taking evidence in the traditional judicial sense, it has adversary characteristics and the minimum obligation of an employer is to inform the interviewer and the claimant of any disqualifying factors. So informed, the interviewer can direct the initial inquiry to identifying a frivolous or dilatory contention by either party."

Defendant's Fact Finding Examiner takes this same role in Connecticut's hearing procedures.

If a determination of eligibility following the procedure described in *Java* may be enforced immediately without violating the due process rights of any party as this Court concluded, it necessarily follows, as recognized by the *Torres* court, (333 F. Supp. 341, 344) that a determination of ineligibility following the same procedure may also be enforced without violating the due process rights of either party. It would be grossly inconsistent to maintain that the interview procedure is reliable when the result is favorable to the claimant and adverse to the employer, but that it is unreliable when the claim is denied. This Court's recent statement in *Arnett* v. *Kennedy*, supra, 4519, that ". . . a litigant in the position of appellee must take the bitter with the sweet" is most appropos. Like the appellee in *Arnett*, the plaintiffs here are challenging the constitutionality of portions of a statute under which they have simultaneously claimed and received benefits. They too, must take the bad with the good.

II. THE THREE JUDGE COURT ERRED IN RECEIVING AND IN CONSIDERING EVIDENCE RELATING TO THE APPEAL PERIOD WHICH FOLLOWED THE HEARING IN QUESTION.

A. Due Process Of Law Does Not Require The Right of Appeal.

In *Owsley* v. *Cunningham*, 190 F. Supp. 608 (E.D. Va., 1961), a habeas corpus proceeding, the Court said, page 611,

> ". . . it is a settled principle of law that the right of appeal is not essential to due process of law. *Standard Oil Company of Indiana* v. *State of Missouri*, 224 U.S. 270, 286-287, 32 S. Ct. 406, 56 L. Ed. 760. Rehearings and new trials are not essential to due process of law, either in judicial or administrative proceedings. *James* v. *Oppel*, 192 U.S. 129, 137, 24 S. Ct. 222, 48 L. Ed. 377."

Even in criminal matters there is no such right.

> "A review by an Appellate Court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities on the point is unnecessary." *McKane* v. *Durston*, 153 U.S. 684, 687-688. (S.D.N.Y., 1894).

See also *Kelly* v. *Metropolitan County Bd. of Ed. of Nashville and Davidson County, Tennessee*, supra, 492 and *Dixon* v. *Alabama State Board of Education*, 294 F. 2nd. 150, 155 (5th Cir. 1961).

B. The Issue Is The Sufficiency Of The Hearing Itself, Not What Happens Subsequent To It.

In *Goldberg* v. *Kelly*, supra, page 267, this Court said, " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394, 34 Sup. Ct. 779, 783, 58 L. Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2nd 62 (1965)." The defendant's seated interview concerning a claimant's own activity during a two week period just ended constitutes a fair opportunity to be heard at a meaningful time and in a meaningful manner. Subsequent appeal for further hearings cannot dilute the fairness of the initial procedure. In allowing the introduction, over objection, of hearsay evidence concerning matters subsequent to this procedure, and in including findings based on this incompetent and irrelevant evidence, the court below committed error.

The lower court's holding on this point is comparable to a holding that an otherwise adequate trial denied due process because the appeal of one of the parties took too long to be heard by the appellate tribunal. But what of further delay before a final decision is reached? If a Commissioner affirms the defendant-administrator's decision, and the claimant then appeals to the Superior Court, does the added delay *a fortiori* make the hearing by the defendant-administrator constitutionally insufficient? Are the two successive time periods tacked together, and if then overly long, do they constitute a denial of due process? If it were the decision of the defendant-administrator (Fact Finding Examiner) that was delayed, there might be substance to plaintiffs' complaint and the lower court's holding. Since it is the decision on appeal, however, a decision which could take years when considering the claimant's remedy of appeal from the defendant to the

Commissioner, then to the Superior Court, and finally to the State Supreme Court, with intervening requests for reconsideration, such complaint and holding must fail. For these reasons, the lower court, in receiving and relying on evidence as to such "delays" as a prime reason for holding defendant's procedures to be lacking in due process, committed error. And since this was the basis on which the lower court distinguished this case from *Torres*, it is harmful error and must be reversed.

C. The Appeal To An Unemployment Compensation Commissioner Is A Matter Separate And Apart From The Hearing.

As stated previously, the Connecticut Unemployment Compensation Commission is an entity separate and apart from the defendant-administrator and the Employment Security Division of the Connecticut Labor Department; it prescribes its own regulations for the presentation and hearing of appeals. Neither the Commission as a whole nor any Commissioner in particular was named as a defendant in this action. Yet, it is the "delay" which occurs while claimants' appeals are pending before this body which the lower court found to be one of the reasons why due process was not afforded the plaintiffs. (Mem. Dec. 24; J.S. 24A) Defendant submits that such "delays" cannot be attributed to the defendant since he has no authority in the handling of these appeals, and his only participation in same is by way of his being a party to each appeal filed. We note that Steinberg's request for a continuance accounted for a 42 day "delay" in the hearing of his appeal.

Query too, whether such time lapses can properly be called "delays" when the decision appealed from is a decision that benefits are not due. If such a "delay" denies due process, then

such a denial is caused by the Unemployment Compensation Commission, and this action should therefore be dismissed as to the named defendant.

III. THIS COURT NEED ONLY ARTICULATE ITS REASONS FOR ITS PRIOR DECISIONS AND ACTIONS.

A. The Torres Decision Is Applicable And Should Be Followed.

In *Torres* v. *New York State Department of Labor*, supra, this Court held that informal hearings similar to that in issue here were constitutionally sufficient. That case was remanded for further consideration in light of the *Java* decision, supra, where the District Court again denied relief holding that *Java* was not applicable to the issue at hand. This decision was affirmed without memorandum, 405 U.S. 949 (1972), and a Petition for Rehearing was denied. 410 U.S. 971 (1973). The New York Court refused to follow *Goldberg* v. *Kelly* primarily because of the basic differences between Welfare and Unemployment Compensation. In properly distinguishing *Goldberg*, the *Torres* Court pointed out that *Goldberg* arose in the context of public assistance programs, and it said, page 436, "The distinction is vital. In its opinion the Supreme Court repeatedly emphasized the unique situation of the welfare recipient. . . ."And on page 437, the court said further, "In the absence of the 'brutal need' on which the Court rested its decision in *Goldberg*, the governmental interests to which the Court referred must be held to outweigh plaintiffs' claim."

In addition to the reasons based on the difference between the very nature of Welfare and Unemployment Compensation, this case, like *Torres*, is distinguishable from *Goldberg* because the claimants had the opportunity to present their cases to the decision-maker. This was not the case in *Goldberg* nor was it the case in *Wheeler* v. *Vermont*, 335 F. Supp. 856 (Dist. of Vt. 1971). In *Wheeler*, the claimant did not personally present her case to the decision-maker; rather, the decision was made by the local office manager acting as a claims-examiner who based his decision on fact finding reports prepared by another local office employee. Further, the appeal tribunal in *Wheeler* is part of that state's Department of Employment Security, a named defendant which is administered by the Commissioner of Employment Security, another named defendant. Unlike the situation in *Wheeler*, the Connecticut Unemployment Compensation Commission is not administered by the named defendant here, and is not a party to this action. Whatever the validity of the rationale expressed by the *Wheeler* Court, the basis for that rationale, i.e. administration of the appeal process, does not exist here.

By affirming the *Torres* decision, this Court approved the ruling that New York's administrative procedures prior to appellate review afforded Unemployment Compensation claimants due process of law. The reasons for that ruling in *Torres* also exist in this case: The claimants are afforded a fair opportunity to be heard at a meaningful time and in a meaningful manner. Indeed, Connecticut goes even further by its special procedures for monetary claims and certain "third-party" information claims, and because of its statutory presumption in claimant's favor. The *Torres* affirmance is consonant with the remand by this Court of *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, (1973), and is evidence of this Court's consistent reluctance in unemployment compensation cases to apply the *Goldberg* rationale to the hearing procedures in question. Three times the *Torres* decision has been placed before this Court and twice the Court has in effect summarily affirmed after first remanding for reconsideration in light of *Java*. *Burney* was also before this

Court on the same issue, but was remanded for consideration as to mootness because *Burney*, the only named representative, had received full retroactive payments after receiving a post-termination hearing. The named plaintiffs in this action have also received post-termination hearings, and those ruled entitled have been paid. But the Connecticut District Court has already ruled that this case is not moot, and has issued an injunction pertaining to all class members, both present and future. In addition to the mootness argument, defendant has already argued unsuccessfully to that court that this Court's summary affirmance of *Torres*, in conjunction with its remand of *Burney*, should be interpreted as a statement to all that this Court is satisfied that *Torres* is dispositive in unemployment compensation cases. It is obvious, therefore, that until this is articulated, the lower courts will continue to go their own various ways. This Court need but follow its past actions in unemployment compensation cases, therefore, and reverse the lower court by holding that *Torres* is dispositive in such cases.

CONCLUSION

The lower court has failed to follow *Torres* on the constitutional question because of a reason applicable to the statutory question: the greater time lapse during the appeal period in Connecticut. The court was obviously concerned about the effects such delays would have on a claimant whereby he would ". . . have to rely upon savings or welfare while awaiting his hearing on the merits of the termination issue." (Mem. Dec. p. 19 J.S. 17A) The court completely overlooked the fact that such claimants need not appear at the local office two weeks later and show that they have met the requirements of the law during the intervening period. Just as a man jailed for contempt carries the key in his pocket, these plaintiffs carried the key to again receive benefits by

making reasonable efforts each week subsequent to the denial. The lower court, therefore, not only erred in receiving and considering such irrelevant and incompetent evidence and in misapplying it, but it also overemphasized its importance by overlooking the claimant's opportunity to qualify for and receive benefits for the very next week.

The lower court also erred in ruling that defendant's hearing procedures do not afford due process. The court has ignored the fact that in most cases, as in the case of each of the named plaintiffs, the only evidence necessary for a determination was given by the plaintiffs themselves; there were no adverse witnesses to confront or cross-examine, and no reason to consult an attorney, although they could have. Where there are adverse allegations, claimants are given the opportunity to rebut. These plaintiffs had collected benefits for prior weeks, and had notice of their obligations to be eligible for benefits for each week.

One can only guess at the reason for the lower court's disregard of these facts. Certainly the prejudicial information as to the "delays" could sway a sympathetic court. Whatever the reason, however, the lower court failed to see that these claimants are not victims of arbitrary or capricious action; they each have a full opportunity to tell their story, to rebut unfavorable information, to submit additional data, to bring with them documents, witnesses and counsel. Due process requires no more.

Defendant respectfully submits that its seated interview hearing procedures are fair to the claimants to the point of being weighted in their favor. For the reasons stated above, therefore, defendant respectfully requests that

the lower court's decision be reversed and that this Court rule that defendant's administrative hearing procedures do afford claimants due process of law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
AUG 12 1974
MICHAEL RODAK, JR., CLERK

No. 73-848

JACK A. FUSARI,
Commissioner of Labor of the State of Connecticut,
Administrator, Unemployment Compensation Act,

Appellant,

v.

LARRY STEINBERG, CECIL PASKEWITZ,
DELIA TRIANA and JUAN MIRANDA,

Appellees.

ON APPEAL FROM THE THREE-JUDGE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-848

JACK A. FUSARI,
Commissioner of Labor of the State of Connecticut,
Administrator, Unemployment Compensation Act,
Appellant,

v.

LARRY STEINBERG, CECIL PASKEWITZ,
DELIA TRIANA and JUAN MIRANDA,
Appellees.

ON APPEAL FROM THE THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPELLEES' BRIEF

QUESTIONS PRESENTED

1. Whether Connecticut's "seated interview" procedure utilized for the termination of unemployment compensation benefits which provides neither adequate notice nor an opportunity for an adversarial prior hearing violates the Due Process Clause of the Fourteenth Amendment?

2. Whether the Connecticut "seated interview" procedure which terminates unemployment compensation benefits without a prior hearing violates the "when due" and "fair hearing" provisions of Section 303(a) of the Social Security Act?

STATEMENT OF THE CASE

This is an appeal from a plaintiffs' class action suit in which a Three-Judge District Court unanimously held unconstitutional the policies and practices of the appellant Administrator of the Connecticut Unemployment Compensation Act, which permitted him to terminate or suspend Unemployment Compensation benefits of persons already determined entitled, without meeting minimum due process standards.[1]

A review of the pertinent scheme of Unemployment Compensation is necessary for a full understanding of the issues presented in this appeal.

Unemployment insurance benefits in Connecticut are paid out of a trust fund maintained by the contributions of in-state employers, including interest and penalties.[2] So long as the state program meets federal statutory requirements, its costs of administration are met by the federal government, pursuant to §302 of

[1] Although the relevant factual background to this case may be complex, it is also undisputed and has been the subject of a lengthy stipulation as contained in the Single Appendix, *See*, A. 35a-44a.

[2] Conn. Gen. Stat. §§31-261 through 31-271 deal with the creation and administration of the Unemployment Compensation trust fund, including collection of employers' contributions.

the Social Security Act, 42 U.S.C. §502. The Social Security Act requires, *inter alia*, that states receiving such assistance have methods of administration "reasonably calculated to insure full payment of unemployment compensation when due," 42 U.S.C. §503(a)(1). And, that state law include a provision for: "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. §503(a)(3). In Connecticut, a claimant's entry into the unemployment compensation system begins with the filing of a valid initiating claim in accordance with Conn. Gen. Stat. §31–230. The state system of determining that initial entitlement is not under attack here.

Instead, the basic issue in this case is the fate of a person who has been found entitled to Connecticut Unemployment Compensation benefits when a question arises as to that person's *continued eligibility* for those benefits.[3] According to Connecticut Unemployment Compensation Department Policy, a person may be disqualified for benefits after a "seated interview" which takes place without notice or representation. According to the Department, the paramount reasons for discontinuing eligibility are a Department finding that a claimant has not been "available for work" or has not made "reasonable efforts to find work" in accordance with §31-235(2) of the Connecticut General Statutes.[4] These reasons generally account for between

[3] The statutory standards for eligibility are set out in Conn. Gen. Stat. §31-235. J.S.A. 26A. The reasons for the disqualification of a claimant appear in Conn. Gen. Stat. §31-236. *Id.*

[4] J.S.A. 26A.

60 and 70 percent of the denial of benefits resulting from a "seated interview."[5]

[5]The Appellant's Brief in Opposition to Appellees' Motion to Affirm at 2, stating that the Three-Judge District Court ignored certain statements of the defendant, falls considerably short of reflecting all the pertinent facts with respect to these figures on the denial of benefits. At trial, parties stipulated that:

> The most common reason for denying benefits to a claimant who has been initially determined eligible to receive benefits is an alleged failure to comply with the "reasonable effort" and "able and available" section of Connecticut General Statutes. Section 31-235(2). These reasons generally account for between 60 and 70 percent of the denial of benefits resulting from "seated interviews" . . . . (Stip. to Facts, para. 14) (A. 39a).

In its opinion, the District Court stated "[A]t the hearing before this court, the defendant stated that this figure [60 to 70 percent] was in error, being based in part upon original denials of initiating claims. Defendant was unable, however, to provide us with a more accurate figure." (J.S.A. 3A.) *Steinberg v. Fusari*, 364 F.Supp. 922, 925 n. 7 (D.Conn., 1973).

At trial the Appellant was of the opinion that certain statistics were not available. However, Theodore W. Hatcher, the Director of Unemployment Compensation for the State of Connecticut, testified on behalf of the Appellant as follows:

> • • • •
>
> JUDGE NEWMAN: Do you have any basis for estimating what portion of all the denials that the plaintiffs are talking about [60 to 70 percent] are the ones you were talking about?
>
> • • • •
>
> THE WITNESS: It's very difficult for me to estimate however, I can say it includes cases where people are ill and come in seeking benefits and not meeting the eligibility requirements. They may have injuries and other things that do not qualify them under the benefit. They are a small percentage, I would say, of the total number of cases, but I can't give you an estimate.
>
> • • • •
>
> JUDGE BLUMENFELD: What about the other class where they have certain standards of their own as to where they are going to work and what kind of work they are going to do?
>
> • • • •
>
> THE WITNESS: This is also a small percentage.

(A. 213a-214a).

The Department defines "available for work" and "reasonable efforts" for continued eligibility as follows (A. 250a):

> "AVAILABLE FOR WORK." You must be ready, willing and able to take any suitable job on a full-time basis.
>
> • • • •
>
> REASONABLE EFFORTS TO FIND WORK." Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work.[6]

After the determination of initial entitlement is made, the claimant is instructed to report bi-weekly to his local unemployment office. Upon reporting, he fills out a "Continued Claim for Unemployment Compensation," (U.C.–46), upon which he declares under oath his availability for work and his "reasonable efforts" to find work. The claimant also fills out a "Continued Claim Work Effort Information Form,"(U.C.–45)[7] on which he lists the dates and places he has gone seeking employment. He then enters the claims line and eventually presents the completed forms to an employee of the Unemployment Compensation Department.[8]

[6]Unemployment Compensation Booklet, "Your Rights and Responsibilities Under the Connecticut Unemployment Compensation Law," Conn. Dept. of Labor (Oct. 1, 1971) at 21. Connecticut, unlike many other states, does not have a manual of policies and procedures. Instead, policy is defined in a loose collection of Department memoranda.

[7]Reproduced at A. 121a, with corresponding Department memo at A. 122a.

[8]The Connecticut State Labor Department contains an Employment Security Division, Conn. Gen. Stat. §31-237(a), subject to the supervision of the Labor Commissioner as Administrator, *see* §31-222(a). Within this division, there are two departments, the State Employment Service Department, and the Unemployment Compensation Department. §31-237(a). It is with the latter that the claimant chiefly deals.

If no questions arise, the claimant is routinely given his benefit checks for the two-week period at issue.

When an issue arises as to the claimant's continued eligibility, the Department's procedure is relatively simple. The Department employee at the head of the claims lines looks at the U.C.-45 and U.C.-46 forms and either issues a check or if an issue of possible disqualification arises, directs the claimant to another line for a "seated interview."

Upon reaching the head of this line, the claimant is interviewed by a claims examiner who ascertains from the claimant "facts" as to his possible disqualification. If the examiner decides that the claimant is eligible, the claimant is referred back to the claims line to pick up his checks. If, however, the claims examiner decides that the claimant has not met the statutory requirements, the claimant does not receive his benefit checks but is told he will later receive written notification of the Department's decision concerning his eligibility for the weeks in question. This notice is a letter stating the reason for the non-payment citing a statutory provision therefor, and informing the claimant of his right to appeal. These letters are sent out under the signature of the office manager.

Of necessity, questions will often arise during the "seated interview" which involve third-party information. If such a question arises, the "fact finder" will attempt to contact the third party while the claimant is present, and will take the information into consideration when reaching a decision. However, if the third party cannot be reached, the claims examiner may still proceed to make his own determination as to eligibility.[9]

[9]Subject to the statutory directive that coverage, eligibility and non-disqualification are to be *presumed* in doubtful cases. Conn. Gen. Stat. §31-274(c), J.S.A. 31A.

The Department deviates from its "seated interview" procedure in at least two instances both concerned with the issue of whether a claimant has refused a job offer. If an employee of the State Employment Service Department has provided information that a claimant has refused to accept a job referral, notice is sent to the claimant scheduling a hearing for a date and time certain and advising the claimant of the reason for the hearing and of his right to bring counsel and witnesses. The claimant then has the right to confront the Department employee at this hearing. In the routine case, benefits continue until the hearing is held. Similarly, if information concerning the refusal of a suitable job comes from an interested employer–one whose "merit rating"[10] account has been charged because of the termination of the claimant's employment–notice of a proposed hearing is sent both to the claimant and the employer and a procedure similar to the one above is followed.

However, since the majority of cases involve a fact finder's determination that the claimant has not made reasonable efforts to find work, a pre-termination hearing is the exception, rather than the rule.[11]

[10]Conn. Gen. Stat. §31-226, J.S.A. 26A.

[11]Even though this seems to violate Department policy, as outlined in the Booklet, "Your Rights and Responsibilities Under the Connecticut Unemployment Compensation Law" which states *inter alia:*

> PRE-DETERMINATION HEARINGS
>
> If a question arises about your eligibility for benefits, an informal pre-determination hearing will be scheduled at the office where you are filing claims. You will be notified in advance of the time, place and purpose of the hearing, and of any evidence, such as medical certificates, that may be required.
>
> You will have the right to bring witnesses if you wish to do so. If your former employer is involved, he will also be notified in advance of the hearing and will have the right to attend or furnish information by mail or telephone. The employer also has the right to representation.

Once the claimant receives written notice of the fact finder's decision, he may file an appeal. This appeal is heard by an Unemployment Compensation Commissioner (*see*, Conn. Gen. Stat. §§31-241 and 31-242), who determines the matter of eligibility *de novo*. Unless "good cause" is "shown", Conn. Gen. Stat. §31-241, benefits for the period at issue are not paid pending appeal. Thereafter, an appeal on the record lies to the Superior Court. *See*, Conn. Gen. Stat. §31-249.

No attack is made here upon the procedures employed in the eventual Commissioner's hearing.[12] However, of the 461 intra-state appeals disposed of in Connecticut during December, 1972, fully 414 took at least 101 days between the time the appeal was filed and the date that a final decision was reached. Put in percentage terms, this means that about 89.8 percent of all appeals took over 100 days to decide. And, the figures indicate that 61 percent of all appeals took over 125 days to dispose of, while 29.5 percent consumed over 150 days before the Commissioner's decision.[13] As the District Court concluded: "[F]igures from other months strongly suggest that the December figures are not unrepresentative", and that the average delay is well over 126 days. (Footnote omitted).[14]

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[12]The sufficiency of the Commissioner's hearing system, however, is presently under attack in the District Court of Connecticut. *See, Kohlbeck v. Loughlin*, et. al., Civil Action No. H-74-151 (D. Conn.) filed May 13, 1974.

[13]These figures are derived from an exhibit prepared by the plaintiffs after a detailed examination of the Unemployment Compensation Commission records (Plaintiffs' Exhibit 32). *See*, A. 133a-132a; J.S.A. 18A, *Steinberg v. Fusari*, 364 F.Supp. 922, 934 n. 22, 23 (1973); *see also*, Stipulation As to Plaintiffs' Exhibits, A. 45a.

[14]*Steinberg v. Fusari*, 364 F.Supp. 922, 934, J.S.A. 18A.

The District Court also found that a significant number of claimant appeals from the seated interview decision result in reversals of the original decision.[15]

A review of the factual situations of three of the named appellees will serve to put the general background outlined above into a sharper perspective.[16]

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[15]For example, the District Court found a reversal rate of 26.1 percent for the year July, 1971 to June, 1972; 26.0 percent for July, 1972 to October, 1972; and 19.4 percent from January, 1973 through March, 1973. *See, Steinberg v. Fusari*, 364 F.Supp. 922, 936-37 n. 28 (1973); J.S.A. 22A.

[16]The original complaint named as plaintiffs Larry Steinberg and Cecil Paskewitz and requested a class action. While this case was pending before the District Court, the defendant administrator changed his position with respect to Paskewitz and the class he represented.

Paskewitz had received weekly benefits from August, 1971 until February of 1972, covering a period of some 26 weeks. In February of 1972, Paskewitz applied for extended benefits under Conn. Gen. Stat. §31-232b *et seq.* The application was initially approved, but when Paskewitz went, on March 2, 1972, to the Enfield Office to collect his extended benefit checks, he was told that he was no longer eligible and would not receive further assistance because a mistake had been made in the computation of his "wage credits" for eligibility. His appeal of that decision has been heard by an Unemployment Commissioner; at the time this case was argued no decision had been forthcoming.

The defendant Administrator conceded that Paskewitz should have been given a hearing on the underlying issue, which involved a determination of whether he had compiled sufficient wage credits to have been initially eligible for benefits. The defendant has changed its policy so that future cases involving such entitlement determinations will be handled in the following manner. Claimants are to be notified of a hearing at a time and place certain, at which they may bring counsel and present evidence on the entitlement issue. Benefits will be paid to affected claimants until a written decision on the merits has been issued, following the noticed hearing. *See*, Letter from Attorney General to Three-Judge District Court, A. 147a and Proposed Consent Order, A. 149a; *Steinberg v. Fusari*, 364 F. Supp. 922, 926-27 n. 15, J.S.A. 5A-6A.

Larry Steinberg had filed a valid initiating claim for benefits in Willimantic on or about April 17, 1971, and received weekly benefits through October 9 of that year. On October 27, Steinberg reported to the Willimantic Unemployment Compensation Office for his bi-weekly visit, and to claim benefits for the weeks ending October 16 and 23, 1971. He was directed from the claims line to a "seated interview." After some discussion with a fact finder, Steinberg was told that he would not receive the two weekly checks at issue, for failure to use "sufficient efforts to obtain work."

A formal notice, citing the statutory requirements of Conn. Gen. Stat. §31-235(2) was received by Steinberg on November 1, 1971, disqualifying him from benefits retroactive to October 10. Steinberg filed an appeal to the Unemployment Compensation Commission on November 5; a hearing was held on January 13, 1972. On May 10, 1972, the Commissioner upheld the Departmental fact finder; Steinberg did not seek review in the courts.

Appellee Delia Triana is a married woman with a husband and four children.[17] She was laid off from her employment at General Electric Company in Bridgeport because of lack of work. (A. 135a.) She filed a valid initiating claim for Unemployment Compensation benefits on June 18, 1972, in Bridgeport, Connecticut, was determined eligible, and received weekly benefits through July 8, 1972.

On or about July 24th, Mrs. Triana reported to the Bridgeport Unemployment Compensation office to file for and receive her benefit checks for the weeks ending

[17]Connecticut does not participate in the Aid to Families with Dependent Children - Unemployed Parent Program (AFDC–UP). The AFDC–UP Program was established by §407 of the Social Security Act (42 U.S.C. §607), with participation by the states made optional. Connecticut has chosen not to participate in this program. *See*, Stipulation to Facts, A. 43a., para. 39.

July 15th and July 22nd. She submitted her U.C.-45 and U.C.-46 forms and was told she would have to have a seated interview to determine if she had made reasonable efforts to obtain work. At the interview, the claims examiner determined she had failed to make "reasonable efforts to obtain work." Mrs. Triana did not receive checks for the weeks ending July 15th and July 22nd, at that time. At two subsequent bi-weekly appointments, Mrs. Triana was disqualified from receiving benefits for the four-week period between July 29, 1972 and August 18, 1972 on the ground that she had failed to make "reasonable efforts to obtain work."

On or about July 27, 1972, the Department sent written notice to Mrs. Triana informing her that she was disqualified indefinitely[18] from July 9, 1972 because she failed to satisfy the "reasonable efforts to obtain work" section of Connecticut General Statutes, Section 31-235(2). On or about August 7th Mrs. Triana filed an appeal on the termination of her benefits. Because of a large backlog of pending appeals, totaling 6,100 statewide as of August 31, 1972, her appeal was not heard by an Unemployment Commissioner until October 27, 1972.

[18]The parties stipulated that:

> Defendant's written policy is that the claimant will remain eligible for subsequent time periods so long as he satisfies eligibility requirements for those periods. In actual practice, however, some claimants who were found ineligible for one claims period and who filed appeals to the Unemployment Compensation Commission were denied benefits for later periods on the grounds that "they have appeals pending," in violation of the department's written policy.
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> Stipulation to Facts, para. 15, A. 39a.

Thus, Mrs. Triana was one of the victims of this violation of policy.

On November 10, 1972, the Commissioner rendered his decision. The Commissioner's findings of fact included the finding that Mrs. Triana "was desperate for work and sought all types of work in the local labor market."[19] The Commissioner's decision was that Mrs. Triana was correctly denied benefits for the first two-weeks in question and was incorrectly declared ineligible for the four-weeks between July 29, 1972 and August 18, 1972 and that she was entitled to benefits for the latter period.

Appellee Juan Miranda is a married man with a wife and two children. He lost his employment in June 1972 because the Felix Brass Company of Bridgeport closed permanently. (A. 139a). He filed an initiating claim for Unemployment Compensation benefits on July 2, 1972 in Bridgeport, was determined eligible and received benefits through August 12, 1972. On August 30th, Mr. Miranda reported to the Bridgeport office to receive his benefit checks for the weeks ending August 19th and 26th, 1972. When he presented his U.C.-15 and U.C.-46 forms, he was referred to a seated interview where it was determined by a claims examiner that Mr. Miranda had failed to make "reasonable efforts to obtain work." Consequently, he did not receive his checks for the weeks ending August 19, and August 26, 1972.

Subsequently, Mr. Miranda received written notice that all Unemployment Compensation claims from August 13, 1972 onward were disapproved. Mr. Miranda appealed on September 13th and on October 23, 1972 the Commissioner rendered his decision and held that during all periods in question, Mr. Miranda had "demonstrated a sincere effort to seek employment

[19] *See,* Decision of Timothy J. Loughlin, Commissioner of Unemployment, para. 8, A. 28a-29a; Stipulation to Facts, para. 22, A. 40a.

within the meaning of the Unemployment Compensation Act," and therefore was eligible for benefits withheld for the eight-week period from August 13, 1972 to the date of the appeal hearing.[20]

Prior to their hearings before the Commissioner, both Miranda and Triana intervened in this action in the United States District Court, (A. 1a, 3a), challenging the termination or suspension of their unemployment compensation benefits without notice of a hearing in violation of the Fourteenth Amendment and §303 of the Social Security Act, 42 U.S.C. §503 *et seq.*

A Three-Judge District Court was convened on November 13, 1972[21] with a hearing on the merits held on May 14, 1973. On September 17, 1973, the District Court entered its Memorandum of Decision declaring this action to be a class action in accordance with Fed. R. Civ. Pro. 23(b)2 and unanimously holding that "the 'seated interview' system as currently used for termination or suspending the payment of unemployment compensation benefits does not provide minimal due process under the 14th Amendment to the Constitution." It enjoined ". . . the defendant Administrator . . . from administering Chapter 567, Conn. Gen. Stat.

[20] *See,* Decision of Peter J. Issogna, Commissioner of Unemployment, A. 30a-31a; Stipulation to Facts, para. 29, A. 41a.

[21] At the time the motion to convene a Three-Judge Court was under consideration, twelve additional plaintiffs sought to intervene. (A. 1a.) In the memorandum of decision dated November 13, 1973 (A. 3a) Judge Newman granted the motions of Triana and Miranda to intervene, noting that they were presently back on the unemployment rolls after the disposition of their appeals, and thus had a particular interest in the procedures that might be employed in any subsequent terminations of their benefits.

See, Goldberg v. Kelly, 397 U.S. 254, 256 (1970).

(§31-222 et. seq.) in such a manner as to deprive members of the plaintiff class of unemployment benefits without first according them a constitutionally sufficient prior hearing." *Steinberg v. Fusari,* 364 F.Supp. 922, 938 (D. Conn., 1973) J.S.A. 24A. The Court held that the "seated interview system" as currently used for terminating or suspending unemployment compensation benefits does not provide minimal due process under the Fourteenth Amendment to the Constitution. "Essentially," the Court held, "we find due process lacking because (a) a property interest has been denied (b) at an inadequate hearing (c) that is not reviewable *de novo* until an unreasonable length of time." *Id.*

On September 25, 1973, the Appellant moved that the District Court stay the permanent injunction pending appeal to the Supreme Court, which motion was granted on October 3, 1973. (A. 275a.)

On March 21, 1974, the Appellees moved that the District Court restore the injunction, which motion was denied on April 19, 1974.

In its Opinion on the Merits, the District Court noted that the "seated interview" system does not provide sufficient due process because:

> . . . Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their argument or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact finding examiner may go beyond the record of the "seated interview" in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory

> citation to a statutory section concerning disqualification.
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> * * * *
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> Of course, formulation of an appropriate system is in the first instance the responsibility of the defendant Administrator. But when an administrator is making as subjective a determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to fairly and completely present his side of the case, and to meet any unfavorable evidence. This the present system does not do. *Steinberg v. Fusari,* 364 F.Supp. 922, 936 (1973), J.S.A. 20A, 21-22A. (citation omitted) (footnote omitted).

SUMMARY OF ARGUMENT

1. Connecticut's "seated interview" procedure for terminating or suspending unemployment compensation benefits does not provide adequate due process of law.

In this case, the Appellant concedes that the elements of due process which must proceed the suspension or termination of unemployment Compensation benefits are: (1) advance notice, (2) an opportunity to present a case, (3) an opportunity to rebut evidence, (4) an opportunity to consult with counsel, and (5) receipt of reasons for the denial of the benefits.

To achieve this goal, the Appellant operates a "seated interview" system which basically requires a claimant to be taken from the claims window, where he is supposed to be given his benefit check at once, to a "seated interview" where he is questioned about his efforts to find work during the past week. This "seated interview" only occurs when the person at the claims window suspects that the claimant may not have made "reasonable efforts" to find work or was not "available" for work. When such question arises, the seated interview takes place immediately. The Appellant's system provides nc appeal process. Instead the only appeal is through a separate appeal process. The record shows that this process entails an *average* delay of 126 days between filing an appeal and decision. Moreover, these decisions generally reverse those made at the seated interview between 19 and 26 percent of the time.

In *Bell v. Burson* this Court stated: "In reviewing state action in this area . . . we look to substance not to bare form to determine whether constitutional minimums have been honored." 402 U.S. 535, 541 (1971), quoting *Willner v. Committee on Character* 373 U.S. 96, 106-107 (1963) (concurring opinion). The District Court did exactly that, and after full consideration of the Appellant's arguments and a complete examination of the operation of the Appellant's seated interview system, the District Court concluded:

> [W]e still think it clear that the seated interview system does not provide sufficient procedural due process. Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently, have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is

> presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact finding examiner may go beyond the record of the "seated interview" in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification.
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> Essentially, we find due process lacking because (a) a property interest has been denied, (b) at an inadequate hearing (c) that is not reviewable *de novo* until an unreasonable length of time. *Steinberg v. Fusari*, 364 F. Supp. 922, 935, 937-38 (D. Conn., 1973), J.S.A. 20A, 24A. (citation omitted) (footnote omitted).

Due process, by its very nature "... negates any concept of inflexible procedures universally applicable to every imaginative situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). However, the hearing required by the due process clause must occur "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and it must be "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Where as here an entitlement to unemployment benefits is involved, and where a termination of those benefits would as a practical matter impose recognizable hardship, this Court in considering the factors of: (1) the nature of the private interest at stake; (2) the asserted governmental interests involved; (3) whether the issue to be determined at the administrative proceeding involves the application of a broad "fault" standard: (4) the adequacy and the operation of the existing procedures; and (5) whether

those procedures provide for a full and immediate hearing before the final administrative order becomes effective, must conclude that the Appellant's existing system violates due process of law.

The District Court was correct in determining that there is a constitutionally sufficient property interest in the continued receipt of unemployment compensation benefits to invoke the due process requirement of the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 576-79 (1972); *Perry v. Sindermann*, 408 U.S. 593, 596-603 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Moreover, notice and hearing is required *prior* to the termination of those benefits because the importance of the individual interest at stake clearly outweighs the governmental function involved.

Since a legitimate claim of entitlement is involved which has been terminated on a broad fault standard without adequate prior notice, and hearing for no overriding asserted governmental purpose, the Court must affirm the opinion of the District Court and require notice and hearing *prior* to the termination of unemployment compensation benefits. This is so because the "seated interview" system of termination of unemployment compensation was found by the District Court to often rest on incorrect or misleading factual premises or on the misapplication of rules or policies to the facts of particular cases. *Steinberg v. Fusari*, 364 F. Supp. 922, 935 (1973), J.S.A. 20A. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 257 (1970).

2. The summary suspension of unemployment compensation benefits violate the "when due" and "fair hearing" requirements of the Social Security Act.

Under Title III of the Social Security Act, Congress intended unemployment compensation to serve three distinct purposes (1) to enable workers to survive temporary periods of unemployment without having to resort to relief, (2) to help workers find re-employment, and (3) to maintain the purchasing power of the unemployed, thus stabilizing consumer demand. To achieve these objectives state unemployment compensation procedures must be designed to provide "early substitute compensation during unemployment." *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971). In order to assure that benefits are paid in a timely fashion, the Act provides that State unemployment procedures "be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. 503 (a) (1). For benefits to be paid "when due":, they must not only commence promptly once an unemployed worker is determined eligible for a fixed number of weeks, *see Java, supra*, but must also be paid regularly throughout his fixed period of eligibility until such time as he has been properly found to be no longer eligible for them. Only a procedure that provides an opportunity for a prior evidentiary hearing before benefits are suspended insures unemployed workers the continuous payment of unemployment compensation "when due."

Connecticut's Unemployment Compensation system finds a claimant eligible for benefits for a fixed number of weeks. Once an entitlement to benefits by the claimant has been established and initial eligibility

determined, Conn. Gen. Stat. §31-235 (1)(2), benefits are now "due" the unemployed worker. Yet Connecticut's system of randomly checking "continued eligibility" for unemployment benefits by means of an informal "seated interview" often results in the abrupt suspension of those benefits. An appeal by the claimant brings no full evidentiary hearing on the issue of eligibility for an average period of well over 100 days. (J.S.A. 18A.) If the referee finds that the suspension was erroneous, as occurs in virtually 20% of the cases, the eligible unemployed worker receives his benefits retroactively in a lump sum. Since the average length of time an unemployed worker receives compensation is between 9 and 12 weeks, the 18 week delay waiting for the appeal, forces the claimant and his family to survive without "sustaining funds". *Nash v. Florida Industrial Commission,* 389 U.S. 235, 239 (1957) Connecticut's Administration of its unemployment program does not fulfill:

> [T]he Congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasable . . . [which] is what the unemployment insurance program was all about."
>
> *California Human Resources Department v. Java,* 402 U.S. 121, 135.

The Appellants argue (Brief of Appellant at page 34) that this Court is bound by its summary affirmance in *Torres v. New York State Department of Labor,* 405 U.S. 949, *rehearing denied,* 410 U.S. 971. But as Mr. Justice Rehnquist reminded just last Term that "summary affirmances . . . obviously are not of the same precedential value as would be an opinion treating

the question on the merits." *Edelman v. Jordan* ___ U.S. ___, 39 L. Ed 2d 662, 677 (1974). The lower court did agree for the reasons stated by the District Court in *Wheeler v. Vermont,* 335 F. Supp.856 (D. Vt., 1971) that benefits are "due" until a full evidentiary hearing is held, J.S.A. 13A, and that the Appellants "seated interview" system of terminating unemployment benefits violates § 303 (a) (1) and (a) (3) of the Social Security Act, but did not so rule because of a Circuit rule on summary affirmances. *Doe v. Hodgson,* 478 F. 2d 537, 539, *cert. den.,* 414 U.S. 1093 (1973).

The Social Security Act further requires that the Department provide a "fair hearing" to unemployed workers whose benefits it seeks to suspend. As the Congressional intent makes abundantly clear, the purpose of the unemployment compensation program is to provide immediate assistance on a continuing basis to the unemployed worker, without an on again – off again delivery of payments. Only a prior "fair hearing" insures the regular flow of benefits to eligible workers – which "is what the unemployment insurance program was all about." *Java, supra,* 402 U.S. at 135.

ARGUMENT

INTRODUCTION

Although not binding on this Court, the Appellant in his Brief on the Merits unquestionably concedes that the following are the requisite elements of due process which must precede the suspension or termination of Unemployment Compensation benefits: (1) advance notice, (2) an opportunity to present a case, (3) an

opportunity to rebut evidence, (4) an opportunity to consult with counsel, and (5) receipt of reasons for the denial of benefits. In fact, he devotes an entire argument to them. *See*, Brief of Appellant, at 16-21. Indeed, the Appellant's presentation of the first Question Presented simply asks this Court to determine:

> Whether the plaintiff's [sic] administrative hearing, employing a "seated interview" system, meets minimal due process requirements of the Fourteenth Amendment to the Constitution?
> Brief of the Appellant at 2.

The Appellant consistently maintains and attempts to strenuously argue the fairness of the *operation* of those *procedures* which allegedly provide the conceded elements of due process. For example, in the Statement of the Case, the Appellant maintains that: "This case involves the *adequacy of administrative procedures* used to determine weekly claims for Unemployment Compensation." *Id.*, at 3. In the Summary of Argument he states: "It is the adequacy of this hearing procedure [not whether some other procedure is required] which is at issue.[22] The Appellant devotes two seperate sub-arguments to this theme captioned respectively: "The Issue Is The Sufficiency Of The Hearing Itself, Not What Happens Subsequent To It," and, "The Appeal To An Unemployment Compensation Commission Is A Matter Separate And Apart From The Hearing." Brief of Appellant, at 32-33.

In *Bell v. Burson*, this Court stated: "In reviewing state action in this area . . .we look to substance not to

[22] *Id.*, at 8. The Appellant further states: "The correct characterization of the issue is whether the procedures used . . . meet due process requirements. *Id.*, at 14.

bare form to determine whether constitutional minimums have been honored." 402 U.S. 535, 541 (1971), quoting *Willner v. Committee on Character*, 373 U.S. 96, 106-107 (1963) (concurring opinion). The District Court did exactly that and after full consideration of the Appellant's arguments and of the voluminous evidence[23] in this case, which involved a complete examination of the Appellant's "seated interview" procedure on its face and as applied, the District Court concluded:

> [W]e still think it clear that the seated interview system does not provide sufficient procedural due process. Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact finding examiner may go beyond the record of the "seated interview" in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification.
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> Essentially, we find due process lacking because (a) a property interest has been denied (b) at an inadequate hearing (c) that is not reviewable *de novo* until an unreasonable length of time.
>
> *Steinberg v. Fusari*, 364 F. Supp. 922, 935, 937-38 (D.Conn., 1973), J.S.A. 20A, 24A. (citation omitted)(footnote omitted).

[23] As transmitted to this Court the Record below is contained in five volumes.

We recognize that due process, by its very nature "... negates any concept of inflexible procedures universally applicable to every imaginative situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). However, it has been well established by this Court that the hearing required by the due process clause must occur "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and that it must be "appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). Where an entitlement to government benefits is involved and where such denial would impose recognizable hardship, the Appellees suggest that as a framework for appropriate analysis of this type of case the Court must consider the following factors: (1) the nature of the private interest at stake; (2) the asserted governmental interests involved; (3) whether the issue to be determined at the administrative proceeding involves the application of a broad "fault" standard; (4) the adequacy and the operation of the existing procedures; and (5) whether those procedures provide for a full and immediate hearing before the final administrative order becomes effective.

If this Court determines that a legitimate claim of entitlement is involved which has been terminated on a broad fault standard without adequate prior notice and hearing for no overriding asserted governmental purpose, it must affirm the opinion of the District Court and require notice and hearing *prior* to the termination of unemployment compensation benefits. This is so because the "seated interview" system of termination of unemployment compensation was found by the District Court to often rest on incorrect or misleading factual

premises or on the misapplication of rules or policies to the facts of particular cases. *Steinberg v. Fusari*, 364 F.Supp. 922, 935 (1973), J.S.A. 20A. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 257 (1970).

In the next section, Appellees will show that the District Court was correct in determining that there is constitutionally sufficient property interest in the continued receipt of unemployment compensation benefits to invoke the due process requirement of the Fourteenth Amendment. *See, Board of Regents v. Roth*, 408 U.S. 564, 576-79 (1972); *Perry v. Sinderman*, 408 U.S. 593, 596-603 (1972); and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Further, Appellees will show that notice and hearing is required prior to the termination of those benefits because the importance of the individual interest at stake outweighs the governmental function involved. This process, of necessity, requires an examination of the sufficiency of the present procedures. *Bell v. Burson*, 402 U.S. 535, 539-540 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970); and recognition of the inadequacies of the separate appeals process.

I.

PRIOR NOTICE AND AN EVIDENTIARY ADVERSARIAL PRE-TERMINATION HEARING ARE CONSTITUTIONALLY REQUIRED SINCE THE UNEMPLOYED WORKER'S INTEREST IN THE CONTINUED RECEIPT OF BENEFITS OUTWEIGHS THE GOVERNMENTAL INTERESTS INVOLVED.

A. Having Fully Satisfied The Statutory Conditions For Entitlement To Unemployment Compensation Benefits, Appellees Have Established A Property Interest In The Continued Receipt Of Benefits Which Cannot Be Terminated Without Notice And Some Form Of Prior Hearing.

The analytical framework to be utilized in determining an individual's right to the protection of the Due Process Clause of the Fourteenth Amendment was synthesized by this Court in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), as follows:

> To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement for those benefits. *See also, Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Wolff v. McDonnell*, ___ U.S. ___, 42 U.S.L.W. 5190, 5196 (1974).

In Connecticut the issue of "entitlement" is separate and distinct from the issue of "eligibility". In order for a claimant to be found initially *entitled* to unemployment compensation benefits he must satisfy certain statutory prerequisites. Conn. Gen. Stat., Section 31-241 requires that a claimant file a "valid initiating claim." Conn. Gen. Stat. Section 31-230 states that "an initiating claim shall be deemed valid if the claimant is unemployed and meets the requirements of subsections (1) and (3) of §31-235." Stipulation to Facts, para. 2, A. 36a. Those two requirements are, in short, that he has registered for work and that he has established adequate wage credits.[24] Upon satisfaction of these two requirements, the examiner shall promptly determine "the weekly amount of benefits payable and the maximum possible duration thereof." Conn. Gen. Stat. §31-241; Stipulation to Facts, paras. 2 and 4; A. 35a-36a.

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[24]Subsection (1) and (3) of Conn. Gen. Stat. §31-235 provide:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that: (1) he has made claim for benefits in accordance with the provisions of Section 31-240 and has registered for work at the Public Employment Bureau or other agency designated by the Administrator within such time limits, with such frequency and in such manner as the Administrator may prescribe, provided failure to comply with this condition may be excused by the Administrator upon a showing of good cause thereof; . . . (3) he has been paid wages by an employer who was subject to the provisions of this chapter during the base period of his current benefit year in an amount at least equal to thirty times his benefit rate for total unemployment, some part of which amount has been paid or was earned in at least two different calendar quarters of such base period.
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> Stipulation to Facts, para. 2; A. 36a.

In the case at bar, each of the named Appellees were found by the lower court to have established an "entitlement" to unemployment compensation benefits. *Steinberg v. Fusari*, 364 F. Supp. 922, 934-935 (D. Conn., 1973); J.S.A. 19A. It was only thereafter that each was determined at a "seated interview" to be ineligible for unemployment compensation benefits as a result of their alleged failure to satisfy Conn. Gen. Stat., §31-235(2). *See*, J.S.A. at 26A.

In short, in Connecticut one has established a legitimate claim of entitlement to unemployment compensation benefits by being unemployed, registering for work, and establishing sufficient wage credits. *See*, A. 164a-165a. As to this statutory characterization of entitlement, the parties herein are in full agreement. Stipulation to Facts, paras. 2 and 4, A. 35a-36a.[25] It necessarily follows that the "nature of the interest at stake . . . is within the Fourteenth Amendment's protection of . . . property." *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Appellant does not contest the requirement that once an entitlement to property exists it may not be terminated without any notice or hearing. Rather, the Appellant has maintained throughout the present litigation that once entitlement to unemployment compensation benefits has been established in accordance with state law, the claimant is accorded a statutory presumption in favor of "*coverage*, eligibility and nondisqualification in doubtful cases." Conn. Gen.

[25]The same was recently found to be true by this Court in *Dillard v. Virginia Industrial Commission*, ___ U.S. ___, 40 L.Ed. 2d 540, 544 (1974), a case involving the suspension or termination of workmen's compensation benefits.

Stat. §31-274(c) (emphasis added); J.S.A. 31A. *See*, Brief of Appellant, at 5, 18; A. 203a.

This instant case is, therefore, dramatically dissimilar from the situation in Board of Regents v. Roth, *supra*, in which neither "the terms of the respondent's appointment" nor "any statute or university rule or policy . . . secured his interest in re-employment or . . . created any legitimate claim to it." Roth, *supra*, 408 U.S., at 578 (footnote omitted). Having established an undisputed claim to entitlement, it is axiomatic that adequate notice and some type of prior hearing is required before the benefits may be properly discontinued, terminated or suspended.

> Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing. "Except for extraordinary situations where some valid governmental interest is at stake that justifies postponement of the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 119, 91 S.Ct. 780. "While [m]any controversies have raged about . . . the Due Process Clause, . . . it is fundamental that except in emergency situations [and this is not one] due process requires that when a State seeks to terminate [a protected] interest . . ., it must afford "notice and opportunity for hearing appropriate to the nature of the case *before* the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542, 29 L. Ed. 2d 90, 96, 91 S.Ct. 1586. *Board of Regents v. Roth*, 408 U.S. 564, 570 n. 7 (1972).

Indeed, this was the precise holding of this Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970) wherein the welfare recipient had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. "The recipients [in Goldberg] had

not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The controversy in the instant case, then, is grounded solely upon whether the Appellant's "seated interview", which is utilized only as to questions of eligibility[26] can be construed as a "hearing". And, if so, whether it is constitutionally sufficient in terms of the "weight" of the particular property interest in unemployment

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[26]In Department parlance, *entitlement* is referred to merely as "initial eligibility" and *eligibility*, in the Constitutional sense, is referred to as "continued eligibility."

With respect to the issue of entitlement, the Appellant conceded below that when disputes arise, the claimant is entitled to the protection of due process before the monetary entitlement is divested. In sharp contrast to his position with respect to questions of eligibility for a continued claims recipient, he has conceded that:

> While this is a relatively automatic determination which is based solely on whether or not the claimant has sufficient wage credits . . . we now recognize that redeterminations are sometimes necessary because of error or misinformation, and that due process would not be given such a claimant unless he were given a hearing.
> Letter from Attorney General to Three-Judge District Court, A. 147a.

Given this position with respect to the issue of monetary entitlement to unemployment compensation benefits and the full panoply of procedural protections proposed to be afforded a claimant in such a situation, *see*, Appellant's Proposed Consent Order, A. 149a, it is illogical and untenable for the Appellant to deny them where complex factual issues hinge on the admittedly "broad" eligibility standards contained in Conn. Gen. Stat. §31-235(2), J.S.A. 26A, *see*, A. 171a-172a, and where the application of this particular statutory subsection accounts for "between 60 and 70 percent of the denial of benefits resulting from 'seated interviews'." Stipulation to Facts, para. 14, A. 39a.

compensation benefits and the governmental interests involved. *See, e.g. Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972); *Wolff v. McDonnell*, ___ U.S. ___, 42 U.S.L.W. 5190, 5197 (1974).

B. Under The Weighing Test The Appellees' Interest In The Continued Receipt Of Unemployment Compensation Benefits As Against The Department's Interest In Summary Adjudication Compels The Conclusion Reached By The District Court That The "Seated Interview" System Violates Due Process.

Having fully assessed the "nature" of the property interest at issue by examining the state statutory foundation upon which entitlement to unemployment compensation benefits is granted it is unquestioned that due process requires some notice and hearing prior to termination. The determination of the precise form of the hearing required by the Due Process Clause, however, is to be ascertained by applying a weighing test to the interests at stake. *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

Though variously phrased, the weighing test was perhaps best stated by Mr. Justice Stewart, speaking for the majority, in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961):

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well

as of the private interest that has been affected by governmental action.

See also, Mitchell v. W.T. Grant Co., ___ U.S. ___, 40 L. Ed. 2d 406, 412 (1974); *id.*, at 423 (Powell, J., concurring); *Arnett v. Kennedy*, ___ U.S. ___, 40 L. Ed. 2d 15, 41 (1974) (Powell, J. and Blackmun, J., concurring); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 263-266 (1970).

Moreover, in assessing the nature and application of the Due Process Clause it is fundamental that "it is procedure that spells much of the difference between rule by law and rule by whim or caprice." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). This principle becomes all the more paramount where, as here, the adequacy of the existing "seated interview" system for the termination of unemployment compensation benefits is squarely at issue. *See*, Brief of Appellant, Questions Presented, at 2.

1. The claimant's interest in the uninterrupted receipt of unemployment compensation benefits to which he is statutorily entitled is paramount.

The plurality opinion of this Court in *Arnett v. Kennedy*, ___ U.S. ___, 40 L. Ed. 2d 15 (1974), after reviewing the precedential weight of prior decisions involving governmental benefits and important private interests[27], cautioned that:

[27] *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license and vehicle registration); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (wages); and *Fuentes v. Shevin*, 407 U.S. 67 (1972) (consumer goods).

> These cases deal with areas of the law dissimilar to one another and dissimilar to the area of governmental employer-employee relationships with which we deal here. The types of "property" protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.[28] 40 L. Ed. 2d, at 33-34.

[28] This Court's holding in *Arnett v. Kennedy*, ___U.S.___, 40 L.Ed. 2d 15 (1974), that the government's interest in the maintenance of the efficiency and discipline of its own employees is vastly dissimilar to the Appellant's interests in the instant case. In *Arnett*, that governmental interest was found to outweigh those of the employee and the fact that the employee might, as a practical consequence of his discharge, be placed in a "brutal need" situation or undergo a "tremendous hardship" was found, in that situation, not sufficient to tip the balance. As Mr. Justice Powell pointed out in his concurring opinion in Arnett *supra*, 40 L.Ed. 2d at 42, this Court's opinion in *Goldberg* and the type of balancing of interests it represents had expressly distinguished the interest of the discharged government employee from that of a recipient of benefits which were intended to provide the "very means by which to live." *See, Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). However, in cases where this heavily weighted governmental interest is not present, Mr. Justice Powell has observed that this Court has found the nexus between the termination of a right and the consequences that could follow as a practical matter, would outweigh the asserted countervailing interests. As he recently stated:

> In addition, the Court recognized in *Sniadach* that prejudgment garnishment of wages could as a practical matter "impose tremendous hardship" and "drive a wage-earning family to the wall." 395 U.S., at 340, 341, 342 . . . By contrast, there is no basis for assuming that sequestration of a debtor's good would necessarily place him in such a "brutal need" situation.
>
> *Mitchell v. W. T. Grant Co.*, ___ U.S. ___, 40 L. Ed. 2d 406, 426-27 n. 3 (1974) (concurring opinion).

Certainly, this is true with respect to unemployment benefits, where Congress has mandated no "needs" test beyond the fact that the wage-earner is temporarily unemployed.

Clearly since no issue of the maintenance of government employee efficiency and discipline is presented by the case at bar, this Court's departure in Arnett, *supra*, from recent cases upholding an individual's interest in important property interests is not dispositive here.

The significance of unemployment compensation for the unemployed worker is two-fold: *viz.*, unemployment compensation involves many of the characteristics of public benefit programs as well as those of a private contractual wage substitute. The conclusion that the continued receipt of such benefits overrides the Department's interest in retention of its "seated interview" system is compelled not only from an analysis of the two-fold nature of the benefits, but also from scrutiny of other property interests, much less significant, whose proposed termination methods have been held to warrant more stringent procedural safeguards than the procedures challenged herein.

Like other states, Connecticut participates in the cooperative federal-state program of unemployment compensation established by Title III of the Social Security Act, 42 U.S.C. §501, *et. seq.* In this respect it is markedly similar to categorical state-federal welfare programs administered primarily by the states. As respects such public benefit programs enacted by Congress in 1935, this Court has consistently characterized the nature of the Social Security Act as a "scheme of cooperative federalism." *See, e.g., King v. Smith*, 392 U.S. 309, 316 (1968); *Jefferson v. Hackney*, 406 U.S. 535, 542 (1972); *Shea v. Vialpando*, ___ U.S. ___, 40 L. Ed. 2d 120, 125 (1974).[29] In addition, this Court

[29]Indeed only last Term, Mr. Justice Marshall joined by Mr. Justice Blackmun observed:

> The Social Security Act's categorical assistance programs . . . are fundamentally different from most federal legislation . . . [T]he Social Security Act does not impose federal standards and liability upon all who engage in certain regulated activities, including often-unwilling state agencies. Instead, the Act seeks to induce state participation in the federal welfare programs by offering federal matching funds in exchange for the State's voluntary assumption of the Act's requirements.
>
> *Edelman v. Jordan*, ___U.S.___, 39 L.Ed. 2d 662, 687 (1974) (dissenting opinion).

has repeatedly recognized that states which rely even partially on federal reimbursement for use in these social welfare programs must conform to the administration requirements of the Act. *See, e.g., Edelman v. Jordan*, ___ U.S. ___, 39 L. Ed. 2d 662 (1974); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968). The same principle has been applied by this Court to states which, like Connecticut, have elected to administer programs under Title III of the Act which established and governs unemployment compensation insurance. *See, California Department of Human Resources v. Java*, 402 U.S. 121 (1971).

In construing the legislative underpinnings of Title III of the Social Security Act, as a means of defining the parameters of the "when due" provision of the Act, 42 U.S.C. §503(a)(1), this Court determined "that the unemployment compensation insurance program was not based on *need* in the sense underlying the various welfare programs that had their genesis in the same period of economic stress a generation ago." *California Department of Human Resources v. Java*, 402 U.S. 121, 130 (1971) (emphasis added). In this crucial respect, then, unemployment compensation exhibits certain characteristics of a private contractual agreement. To the Congress that created it, unemployment compensation came to an unemployed worker as a "matter of

right,"[30] in the sense of a "contractual right."[31] Further, unemployment benefits were legislatively created to be paid to unemployed workers during a specific period of time—the period in which they were involuntarily unemployed. Java, *supra*, 402 U.S., at 125-126.

In interpreting the importance of such benefits to the unemployed worker, however, this Court has recognized that although eligibility is not premised upon a "needs test" in the same sense as that for other benefit programs of the same Act, "a kind of 'need' is present . . . to the extent that any 'salary replacement' insurance fulfills a need caused by lost employment." Java, *supra*, 402 U.S., at 130. Hence, the Court held that "the objective of Congress was to provide a *substitute* for *wages* lost during a period of unemployment not the fault of the employee."[32] To the extent that an unemployed worker is in "need" as a result of his status and has by prior employment established the

[30] 79 Cong. Rec., at 5468 (1935), remarks of Representative Doughton, Chairman of the House Ways and Means Committee.

[31] Report of the Committee on Economic Security, Hearings on S. 1130 before Senate Finance Committee, 74th Cong., 1st Sess., at 1321-1322 (1935).

[32] In making this determination this Court relied heavily on the Report of the Committee on Economic Security submitted to the Congress by President Franklin Roosevelt in 1935 which:

> recommended a program of unemployment insurance compensation as a 'first line of defense . . . for [a worker] ordinarily steadily employed . . . for a limited period during which there is expectation that he will soon be reemployed. This should be a contractual right not dependent on any means that . . . It will carry workers over most, if not all, periods of unemployment in normal times without resort to any other form of assistance.'

California Department of Human Resources v. Java, 402 U.S. 121, 130-131 (1971) (footnote omitted).

right to unemployment compensation as "an earned money entitlement,"[33] the scope of his interest in continued receipt of such benefits is closely analogous to both the welfare recipient in *Goldbery v. Kelly*, 397 U.S. 254 (1970) and the wage-earner in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

Since a kind of "need" is necessarily present in the situation of the unemployed worker found to be "entitled" to benefits, he is necessarily similarly situated to the welfare recipient found "entitled" to receive welfare benefits in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Since the process of summary termination "may deprive an *eligible* recipient of the very means by which to live while he waits," this Court proclaimed his right to an adversarial, evidentiary pretermination hearing. 397 U.S., at 264 (emphasis supplied); *see also, Wheeler v. Montgomery*, 397 U.S. 280, 282 (1970). Moreover, for those found entitled to receive unemployment compensation benefits, only their continued receipt "provides the means to obtain essential food, clothing, housing, and medical care."[34] Goldberg, *supra*,

[33] *See*, Report of the Senate Finance Committee on the Employment Security Amendments of 1970, S.Rep. No. 91-752, 91st Cong., 2nd Sess., at 24 (1971), and Report of the House Ways and Means Committee on the 1970 Employment Security Amendments, H.R. Rep. No. 612, 91st Cong., 1st Sess., at 19 (1969), both relating to unemployment compensation amendments to the Social Security Act.

[34] This is true in Connecticut which does not participate in the cooperative state-federal program of Aid to Families with Dependent Children – Unemployed Parents Program (AFDC–UP) and which does not provide town welfare assistance, including medical assistance, to otherwise indigent persons who have been found ineligible for unemployment compensation benefits. *Steinberg v. Fusari*, 364 F.Supp. 922, 934 (D.Conn., 1973) (J.S.A., 18A-19A); *Compare*, Goldberg, *supra*, 397 U.S., at 264 n. 11 and Conn. Gen. Stat. §§17-273b and 17-274 *with* Steinberg, *supra*, 364 F.Supp., at 934 n. 24. (J.S.A., 19A.)

397 U.S., at 264 (footnote omitted) (citation omitted).

Indeed, as noted by the Court below:

> Recent statistics suggest that the average unemployment compensation recipient is hardly well-off. In 1970, the average wage covered by unemployment insurance in the United States was $141.09; in Connecticut, it was $149.76. The average weekly benefit in that year in the United States was $50.31, or 35.7% of the average covered wage; in Connecticut, it was $60.26, or 40.2% of the wage. United States Department of Labor, Handbook of Unemployment Insurance Financial Data 1938-1970 at 139 (1971).
> *Steinberg v. Fusari*, 364 F.Supp. 922, 936 n. 26 (D.Conn., 1973), J.S.A. 21A (other citation omitted).

Further, the United States Solicitor General has expressed his opinion to this Court that the instant case is distinguishable from *Torres*. *See*, Brief for the United States In Opposition to Writ of Certiorari, in *Ellenmae Crow, et al., v. California Department of Human Resources Development, et al.*, No. 73-1015. The Solicitor has stated:

> The district court there recognized (364 F.Supp. at 931) that this Court's summary affirmance in *Torres* is entitled to full precedential weight. However, it distinguished *Torres* on two grounds – (1) the post-termination hearing provided by Connecticut in *Steinberg* was not held within a reasonable period of time – the Connecticut appeal procedures, like those of Indiana at issue in *Burney*, entailed a delay of several months rather than the few weeks involved here and in *Torres;* (2) the absence of a fall-back program of Aid for Dependent Children of Unemployed Parents in Connecticut, which would have provided welfare assistance pending appeal of the determination of

> unemployment compensation ineligibility, enhanced the *Steinberg* plaintiffs' interest in uninterrupted compensation.
> *Id.*, at 8-9.

It is reasonable to conclude then that the summary termination of such benefits like the partial garnishment of wages at issue in Sniadach, *supra*, may virtually lead to a family's inability to meet its essential recurring obligations such as rental payments. Such dire consequences as eviction and the inability to purchase a nutritionally adequate diet are nothing short of present "brutal need."

Hence, the withdrawal of even the "partial replacement of wages to the unemployed," not only violates the purpose of the Act; California Department of Human Resources v. Java, *supra*, 402 U.S., at 131, but also in view of Connecticut's lack of other potential resources, most assuredly renders their situation as "immediately desperate" as those of the welfare recipients in Goldberg, *supra*, 397 U.S., at 264.

Thus, although the resultant effects of the Appellant's "seated interview" system place the unemployment worker on the same precarious ledge as that shared by his counterpart in the welfare bureaucracy, as noted by the Court in Goldberg, *supra*, this was not the Congressional intent behind enactment of Title III of the Act. As this Court painstakingly emphasized in Java, *supra*, 402 U.S., at 131-132:

> Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend" (footnote omitted), serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity.

Because unemployed workers have been deemed by Congress to hold a more esteemed position than welfare recipients, this Court's previous pronouncement that "relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation," Goldberg, *supra*, 397 U.S., at 262, must be reaffirmed in the instant case.

Since unemployment compensation exhibits characteristics of both a contractual agreement, and a wage substitute, this Court's decision in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) is especially pertinent here. Like the claimant in the instant case, only 50 percent of the debtor's wages in *Sniadach* was subject to garnishment. Therein, the creditor's lawyer

> by [merely] serving the garnishee [employer] sets in motion the machinery whereby the wages are frozen. They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard. . .
>
> Sniadach, *supra*, 395 U.S., at 338-339 (footnote omitted).

In the case of the unemployed worker, summary termination of benefits at a "seated interview" based upon a broad and subjective standard of "availability for work" and "reasonable efforts to find work" without adequate notice and any prior "hearing" in the constitutional sense violates the very notion of basic fairness. Like wages, the wage substitute of unemployment compensation is "a specialized type of property," Sniadach, *supra*, 395 U.S., at 340, the deprivation of which "may as a practical matter drive [an unemployed

worker and his] family to the wall." *Id.*, at 341-342 (footnote omitted).[35]

The fact that this Court has refused to sanction summary procedures for the taking of other property interests,[36] which although "dissimilar to one another," *Arnett v. Kennedy*, ___ U.S. ___, 40 L.Ed.2d 15, 33 (1974), are far less substantial than the benefits to which unemployed workers like the claimants have been found statutorily entitled and initially eligible, compels the conclusion that the decision of the Court below was clearly correct.

2. Retention of the "seated interview" system would vitiate the proper governmental function of promptly providing unemployment compensation benefits to unemployed workers.

As the Brief *Amici Curiae* for Elenmae Crow, et al.,[37] incisively points out, the Appellant's Brief fails to

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[35]Indeed, as a unanimous Court opined in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), the improper termination of unemployment compensation benefits for a substantial period would cause an unemployed worker to "risk financial ruin." 389 U.S., at 239. In the words of Mr. Justice Black, writing for the Court:

> Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds.

[36]See, *e.g.*, *Bell v. Burson*, 402 U.S. 535 (1971) (driver's licenses); *Boddie v. Connecticut*, 402 U.S. 371 (1971) (marriage dissolution); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (reputation).

[37]This Brief was also submitted on behalf of The American Federation of Labor and Congress of Industrial Organizations, and the United Steelworkers of America, AFL-CIO.

address the issue of the precise governmental function involved in the administration of the unemployment compensation program. Brief of *Amici Curiae* for Ellenmae Crow, et al., at 11-12.

Despite the Appellant's silence on this issue, this Court has already reviewed the relevant provisions and legitimate history of Title III of the Social Security Act and has determined that the proper governmental function of a participating state labor department such as that of Appellant is the payment of unemployment compensation benefits to eligible persons "at the earliest stage of unemployment that such payments [are] administratively feasible." *California Department of Human Resources v. Java*, 402 U.S. 121, 131, 133; 42 U.S.C. §503(a)(1). In so holding, Chief Justice Burger writing for a unanimous Court stated:

> Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the Congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes.
>
> Java, *supra*, 402 U.S., at 133.

Despite this clear Congressional directive with the imprimatur of this Court the Appellant's administration of the unemployment compensation program in Connecticut is not neutral. Brief of Appellant, at 28 n.3. "Seated interviews" are conducted by claims examiners who are employees of the Appellant. Stipulation to Facts, para. 11, A. 38a. A claimant, like the Appellees herein, who has been found both statutorily entitled to unemployment compensation benefits and initially eligible reports bi-weekly to the local unemployment office "and is routinely given his benefit checks for the

two-week period unless upon submission of his form that he has been available for work and has made reasonable efforts to find work, the Department employee raises an issue of disqualification." Stipulation to Facts, paras. 8 and 9, A. 37a-38a. And if a question of possible disqualification arises the claimant *is not given his benefits checks*, but is rather referred for a "seated interview." Stipulation to Facts, para. 10, A. 38a (emphasis added).

It is clear from the foregoing review of the continued claims procedure that "seated interviews" are only arbitrarily scheduled for a claimant. The most common reason for the denial of unemployment benefits to those found initially eligible to receive them is alleged failure to comply with the "reasonable effort" and "able and available" requirements of Conn. Gen. Stat. §31-235(2). J.S.A. 26A, Stipulation to Facts, para. 14, A. 39a. Since between 60 and 70 percent of the denials result from "seated interviews" held for these reasons, *id.*, the vast majority of "seated interviews" involve the claimant in an adversary stance against employees of the Appellant. In this setting, "broad" standards are applied[38] and necessarily "subjective" judgments are made with respect to complex factual issues. In

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[38]The Appellant's Booklet, "Your Rights and Responsibilities Under the Connecticut Unemployment Law," describes the requirements of Conn. Gen. Stat. §31-235(2) to the claimant in the following manner:

> AVAILABLE FOR WORK. You must be ready, willing and able to take any suitable job on a full-time basis.
>
> REASONABLE EFFORTS TO FIND WORK. Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work.
>
> Stipulation to Facts, para. 7, A. 37a, 250a.

And it is not clear that all claimants receive even these "guidelines." *See*, A. 94a.

instances where a continued claims claimant is subjected to a "seated interview" without any specific notice, if denied, his benefits are held by the Appellant as the administrator of the Unemployment Compensation Trust Fund. And as the Appellant has candidly admitted, the appeals procedure in Connecticut "could take years," Brief of Appellant, at 32, during which time a claimant is without this partial wage substitute. Hence, at the critical stage, in the "seated interview", the Appellant acts not in a manner to assist the claimant or even in a "neutral" position as he has steadfastly sought to convince this Court, but rather as an adversary seeking to preserve the fisc. The same state interest was rejected by this Court in *Goldberg v. Kelly*, 397 U.S. 254, 261, 266 (1970), and the persuasive reasoning of Mr. Justice Brennan indicates that had this Court reached the merits in the context of social security benefits, the same argument would have been rejected. *Wright v. Richardson*, 405 U.S. 208, 221-26 (1972) (dissenting opinion).

Moreover, the assertion of the same interest to avoid increased administrative costs necessitated by providing constitutionally sufficient prior hearings is not overriding. Goldberg v. Kelly, *supra*, 254 U.S., at 265-66; *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). As recognized by this Court, stated in *Stanley v. Illinois*, 405 U.S. 645 (1972):

> The establishment of prompt efficacious procedures to achieve *legitimate state ends* is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.

Stanley, *supra*, at 561 (and cases cited in n. 8). (Emphasis added.) *See also*, Wright v. Richardson, *supra*, 405 U.S., at 223 (Brennen, J., dissenting.)

In the instant case, however, increased administrative expenses are not borne by the State of Connecticut, but rather by the Unemployment Compensation Trust Fund. *See*, Conn. Gen. Stat. §31-263.[39] And the Appellant is not without adequate means to recoup or set off erroneously paid compensation benefits to workers who survive their unemployment cycle and return to work,[40] unlike the situation in Goldberg, *supra*, where the recipients were assumed to be judgment proof. 397 U.S., at 266.

The interest of the employer is at most tangential since the requirement of the court below that benefits be continued during the pendency of a constitutionally sufficient hearing would be paid not from the general tax revenues of the state, but rather from the Unemployment Trust Fund, which is maintained by the state through employer contributions. Since this tax assessment is borne generally by all employers, at worst an employer would be subject to a minimal future increase in his tax rate. *Cf. National Labor Relations Bd. v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951). By contrast, the need of the unemployed worker to continued receipt of benefits, his exclusive source of income in many instances, is substantial and overrides the interests of both the state and the employers.

In short, the Appellant is mandated to provide compensation benefits to unemployed workers as soon as is administratively feasible. *California Department of*

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[39] 42 U.S.C. §502(a) provides for federal "payment to each state which has an unemployment compensation law [in such amounts as are] necessary for the proper administration of such law." The federal government is not harmed because it pays these amounts from a tax on employers.

[40] Indeed, the record evidence indicates that the recovery rate in Connecticut exceeds 50 percent. A. 201a-203a.

Human Resources v. Java, 402 U.S. 121, 131, 133 (1971). Since both the need of the unemployed worker is substantial and the governmental function clearly established, the unarticulated interests of the state in administrative efficiency and the minimal financial interest of the employer are not compelling. What was stated in the context of the welfare recipient in *Goldberg* is equally true for the unemployed worker in the instant case.

> The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.
>
> 397 U.S., at 265.

Since the district court's decision that the Appellant's "seated interview" system misconceives the proper governmental function and deprives Appellees of their right to due process of law, we urge this Court to affirm its judgment.

II.

WHERE ISSUES TO BE DETERMINED AT AN ADMINISTRATIVE PROCEEDING ARE TO BE DECIDED ON A BROAD FAULT STANDARD, DUE PROCESS REQUIRES NOTICE AND HEARING BEFORE THE TERMINATION BECOMES EFFECTIVE.

The instant case presents another reason for requiring prior notice and hearing in addition to the fact that the governmental function involved does not outweigh the importance of the private interest affected.

As this Court has recently stated, "The risk of wrongful use of the procedure must also be judged in the context of the issues which are to be determined at that proceeding." *Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 40 L.Ed.2d 406, 419 (1974). As is shown in this section, the issues of "availability" for work or a claimant's "reasonable efforts" to obtain work are not ordinarily uncomplicated matters that lend themselves to documentary proof, but instead are decided on a "... broad 'fault' standard inherently subject to factual determinations and adversarial input." *Id.*, 40 L.Ed.2d 405, 419 (1974). The Court in *Mitchell* further cited *Vlandis v. Kline,* 412 U.S. 441, 446-47 (1973) and cases cited therein as support for this proposition.

It is precisely where the issues to be determined at the administrative proceeding involve a broad fault standard that this Court has consistently held that notice and hearing is required *before* the threatened termination becomes effective. Mitchell v. W.T. Grant Co., *supra,* at 419-420. In *Morrissey v. Brewer,* 408 U.S. 471 (1972), this Court required notice and hearing prior to the revocation of parole. In *Stanley v. Illinois,* 405 U.S. 645 (1972), this Court required notice and hearing prior to denial of guardianship to an unwed father. In *Bell v. Burson,* 402 U.S. 535 (1971), this Court required notice and hearing prior to the revocation of driver's license. In *Wisconsin v. Constantineau,* 400 U.S. 433 (1971), this Court required notice and hearing prior to "posting" the name of a person as a heavy drinker. In *Goldberg v. Kelly,* 397 U.S. 254 (1970), this Court required notice and hearing prior to the termination of public assistance benefits. In *Armstrong v. Manzo,* 380 U.S. 545 (1965), this Court required notice and hearing prior to adoption by

another of a legitimate father's child. And, in *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915), this Court required notice and hearing prior to an execution issuing against the property of a stockholder of a corporation.

In *Morrissey v. Brewer, supra,* the pivotal broad fault standard was whether or not the parolee had acted in violation of the conditions of his parole. The petitioner there was alleged to have, among other things, bought a car under an assumed name and operated it without permission, and to have failed to report his place of residence to the parole officer. The position of the second petitioner, Booker, was alleged to be substantially similar, but included the allegation that he had violated the employment condition of his parole by failing to keep himself gainfully employed. In an opinion by The Chief Justice, this Court set out six minimum requirements of due process with respect to the revocation hearing which included advance written notice, a right to present evidence, and to confront and cross-examine adverse witnesses. Even with respect to the preliminary hearing, the Court required advance notice of the alleged violations and opportunity to confront and cross-examine and to have the decision based solely on the information before the hearing officer. *Morrissey v. Brewer,* 408 U.S. 471, 487 (1972). *Cf., Wolff v. McDonnell,* ___ U.S. ___, 42, U.S.L.W. 5190 (1974).

In Stanley v. Illinois, *supra,* state law required that upon the death of the mother, the State automatically take custody of all illegitimate children regardless of the particular fitness of the unmarried father to adequately care for the children. The pivotal broad fault standard on which this Court determined petitioner's right to

notice and prior hearing was whether Stanley himself was an "unsuitable and neglectful parent." *Stanley v. Illinois,* 405 U.S. 645, 654 (1970).

In Bell v. Burson, *supra,* Georgia Law provided that if an uninsured motorist was involved in an accident and could not post security, his driver's license must be suspended without any hearing on the question of fault or responsibility. The pivotal broad fault standard there was on the question of the petitioner's fault for the accident in question. This Court held that since the state purported to be concerned with fault, it could not suspend a license without a hearing on that crucial factor. As Mr. Justice Brennan stated for the Court, "due process requires that when a State seeks to terminate an interest such as that here involved, it must afford notice and opportunity for hearing appropriate to the nature of the case *before* the termination becomes effective." *Bell v. Burson,* 402 U.S. 535, 542 (1971).

In Wisconsin v. Constantineau, *supra,* the pivotal fault standard was whether the appellee was one who "by excessive drinking" produces described conditions or exhibits specified traits such as exposing himself or his family "to want or becoming dangerous to the peace of the community." This Court held that before the appellee had her name posted as such a person, she had to be given notice and hearing on this broad fault standard. *Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971).

More particularly, in Goldberg v. Kelly, *supra,* this Court held that the New York welfare terminations were based on a broad fault standard predicated on whether or not the recipient was meeting certain conditions for continued eligibility. For example, one

recipient alleged that she was in danger of losing AFDC payments for failure to cooperate with the City Department of Social Services in suing her estranged husband. She contended that the departmental policy requiring such cooperation was inapplicable to the facts of her case. Another was cut off for failure to accept counseling and rehabilitation for drug addiction although he maintained he did not use drugs. *Goldberg v. Kelly*, 397, U.S. 254, 256 n.2 (1970).

As the Court concluded:

> In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.
> Id. 397 U.S. 267-68.

In Armstrong v. Manzo, *supra*, Texas law provided that an adoption would not be permitted without the written consent of the child's natural father, except in certain specified "circumstances". One such exceptional circumstance is if the father had not substantially contributed to the support of the child for two years, commensurate with his financial ability. In that event, in lieu of the father's consent, the law provided that written consent of a judge of the juvenile court may be accepted by the adoption court.

Preliminary to filing the adoption petition, Mrs. Manzo filed an affidavit in the juvenile court alleging in conclusory terms that the petitioner had failed to

contribute to the support of the child for a period of two years. A similar broad allegation was made in the adoption court. On this basis the adoption by Mrs. Manzo's new husband was granted. The natural father protested on the grounds that the adoption took place without notice or prior hearing as to him.

This Court held that since the adoption was predicated on the pivotal broad fault standard of the natural father's failure to contribute to the child's support commensurate with his financial ability, failure to give advance notice and hearing violated the most rudimentary demands of due process. *Armstrong v. Manzo*, 380 U.S. 545, 549 (1965).

In Coe v. Armour Fertilizer Works, *supra*, this Court held that before a party's property may be taken to pay an indebtedness on the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled upon the most fundamental principles to a day in court and a hearing upon the broad fault standard involving such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted and other defenses personal to himself. *Id.*, at 423. This Court observed that due process required that a person be given notice and hearing on all questions upon which his liability depends. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).[41]

Of course, we recognize that where executive discretion is unlimited, there is no need for a hearing, even though the standard is based on broad fault. Thus,

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[41] Appellees in no way denigrate the holding of *Fuentes v. Shevin*, 407 U.S. 67 (1972). Instead, they seek to illuminate that class of cases involving important interests terminated on a broad fault standard in which the principles of *Fuentes* must be given full force and effect.

where a statute provided that employment as a clerk was conditioned on maintaining the respect due to Courts of justice, *Ex parte Secombe*, 19 How. 9 (1856) no hearing is required. See also, *Crenshaw v. United States*, 134 U.S. 99 (1890) (Navy officer could be removed at will); *Parsons v. United States*, 167 U.S. 324 (1897) (district attorney could be terminated by the President at his pleasure); *Keim v. United States*, 177 U.S. 290 (1900) (post office clerks removable at pleasure); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

But, where executive discretion is not unbridled but is limited by Congress as in the instant case by Section 303 of the Social Security Act, 42 U.S.C. 503 et seq., notice and hearing are required. See e.g., *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). As this Court has observed: "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process". *Greene v. McElroy*, 360 U.S. 474, 507-508 (1959).

Thus, in determining whether a prior adversarial hearing is necessary before the deprivation of property becomes effective by final administrative order, the Court must first consider the nature of the governmental functions involved, the private interest affected and the precise character of the issue to be determined. Indeed, when assessing the possible issues for disqualification of unemployment compensation benefits, the conclusion that those issues involve a broad fault standard is compelled.

In Connecticut, as in many other states, one who has initially qualified for unemployment benefits may be suspended or terminated for fault for failure to make

"reasonable efforts" to find work or failure to be "available" for work. These two "failures" the District Court found, account for between 60 and 70 percent of all the denials of benefits as a result of a finding of fault at the seated interview.[42] In addition, the District Court found that other common reasons for the suspension of benefits include refusal of a "suitable" job offer, Conn. Gen. Stat. §§31-236 (1) and receipt of disqualifiying or deductible income.[43]

Indeed, the scope of the fault standard is revealed in the fact that termination of benefits often presents such questions as: Was the recipient available for work? Did he make an adequate effort to secure work? Did he adequately investigate job prospects? Did he display the proper attitude and behavior at job interviews? Did he place improper restrictions on the types of jobs he would consider?[44] Did he place improper restrictions on his availability?[45] Has he taken any action that would

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[42] *See*, Stipulation to Facts, para. 14 (A. 39a); *Steinberg v. Fusari*, 364 F.Supp. 922, 925. J.S.A. 3A; Conn. Gen. Stat. §31-235 (2), J.S.A. 26A.

[43] Conn. Gen. Stat. §§31-236(4) and (7). *Steinberg v. Fusari*, 364 F.Supp. 922, 925 (D. Conn., 1973), J.S.A. 3A. *See also*, Stipulation to Facts, para. 14 (A. 39a.).

[44] Yet, in a Department memo dated May 19, 1953 (A. 123a.) the Department commented that it had observed "numerous local office decisions denying benefits for restricted availability which cannot be said to be supported by the facts appearing on the accompanying fact finding reports".

[45] The same memo continued:

> These are cases in which the findings of fact as prescribed in the fact finding report raise nothing more than a mere inference or an implication that the claimant is imposing a restriction on her availability—and it must be remembered that a decision based on inference or implication is as vulnerable as a decision based on presumption. A. 123a.

preclude an offer of employment? Did he make a willful misstatement in order to obtain benefits? Did he hold a job while drawing benefits? Was he physically able to work? Did he receive and refuse an offer for work? If so, was the work "suitable"? Did he receive sufficient information relative to the duties, hours of work, and working conditions to enable him to make a determination as to the suitability of the work? Did a prospective job involve a risk to his health, safety or morals? Was he physically fit to perform this particular job? Did the prospective job comport with his prior training and experience? What is the nature of the job marked in his customary occupation? Has the period of his unemployment been so long as to require him to accept a less skilled and lower-paying job? Is a prospective job located within a reasonable commuting distance from his home?

With respect to the termination of benefits, the District Court also found that of necessity, questions will often arise during the "seated interview" which involve third-party information, generally from a prospective employer whom the claimant has seen or talked to. If such questions arise, the District Court found that the fact finder will make an attempt to contact the third party while the claimant is present and will take into consideration the third party's information in reaching a decision. However, if the third party cannot be reached during the "seated interview", the claims examiner will proceed to make a determination as to whether the person will receive benefits for the two-week period in question.[46] If the

[46]Steinberg, *supra*. *See* Also, Stipulation to Facts, para. 12 (A. 38a).

examiner determines that the claimant has not made "reasonable efforts" to find work or has not been "available" for work the claimant is told that his benefits are suspended and that he will later receive written notification from the Department to that effect. This notification is a letter stating a reason for the suspension and informing the claimant of his right to appeal.[47]

Therefore, it is clear that the facts relevant to making a decision to suspend unemployment compensation benefits are not narrowly confined, but involve complex factual issues which do not lend themselves to documentary proof. Instead, they require the application of a "... broad fault standard inherently subject to factual determinations and adversarial input" which this Court has held ill-suited to summary determination. *Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 40 L.Ed.2d 406, 419 (1974).

As this Court recognized in an unanimous opinion by The Chief Justice dealing with Unemployment Compensation: "Although the eligibility interview is informal and does not contemplate the taking of evidence in the traditional sense, it has adversary characteristics. . . ." *California Department of Human Resources v. Java*, 402 U.S. 121, 134 (1971).

The Appellant has readily conceded that the entire "seated interview" system is predicated on a broad fault standard and requires the resolution of complex factual issues. At trial, or through deposition, Theodore W. Hatcher, the Director of Unemployment Compensation

[47]The District Court found that the *average* delay between filing an appeal and the rendering of a decision was well over 126 days or 18 weeks. *Steinberg v. Fusari*, 364 F.Supp. 922, 934 n. 22 (D. Conn., 1973), J.S.A. 18A.

for the State of Connecticut, and Eleanor Smarz, manager of a District Office, both testified that the "seated interview" involves the determination of complex factual issues and the application of a broad statutory standard. A. 76a-80a, 84a-85a, 171a-172a.[48] The Appellant in his brief on the merits states that continued receipt of unemployment benefits is "... dependent on facts and behavior which vary from week to week." Brief for Appellant, at 21. With respect to two of the appellees, his Brief asserts "... Triana and Miranda were both denied benefits because they had failed to make reasonable efforts." *Id.*, at 25.

A more detailed description of the elements and operation of this broad fault standard based on an administrative determination of a claimant's failure to make "reasonable efforts" to find work or to be "available" for work is contained in the section that follows. However, with respect to the appellees Miranda and Triana, the record discloses that the fact finder's decision at the "seated interview" was reversed at the subsequent Commissioner's hearing. At the "seated interview," both Mrs. Triana and Mr. Miranda were

[48]In fact, the Connecticut Director of Unemployment Compensation testified as follows (A. 171a-172a):

> Q. Isn't it true that at the seated interviews, it very often involves the application of a very broad, in fact, vague standard such as available for work, reasonable efforts to make work, [refusal of a] job that was suitable as defined in the statute, ... isn't the fact finder very often asked to apply those particular standards to the facts of the case before him?
>
> A. I must qualify part of my answer because you refer to vague statute.
>
> Q. I call it broad. I will withdraw the term "vague."
>
> A. Broad. They have to apply broad standards, yes.

disqualified for a total of 14 weeks on the issue of whether they were making "reasonable efforts" to find work, and suffered severe hardships as a result. At appeal hearings several months later, two separate Unemployment Compensation Commissioners reversed the local office decisions and held that 12 of the total 14 weeks had been improperly withheld from Mrs. Triana and Mr. Miranda. (Stipulation to Facts para. 22, 29; A. 40a-41a). The Commissioner's decision on Mrs. Triana found that she "was desperate for work [and] sought all types of work in the local labor market." A. 29a. With respect to Mr. Miranda, the Commissioner found that: "The Claimant, during the period of time in question, has demonstrated a sincere effort to seek employment within the meaning of the Unemployment Compensation Law...".[49]

The District Court clearly recognized the presence of this broad fault standard and admonished:

> When an administrator is making a subjective determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to *fairly* and *competently* present his side of the case, and meet any unfavorable evidence. This the present system does not do. *Steinberg v. Fusari*, 364 F.Supp. 922, 956 (1973), J.S.A. 21A-22A (footnote omitted) (emphasis added).

In *Bell v. Burson*, 402 U.S. 534, 539-542 (1971), after determining that Georgia's suspension of the petitioner's driver's license was predicated on a broad fault standard, this Court stated:

[49]*See*, Decision of Timothy J. Loughlin, Commissioner of Unemployment, para. 8. A. 29a-29a; Decision of Peter J. Issogna, Commissioner of Unemployment, A. 30a-31a.

> We turn then to the nature of the procedural due process which must be afforded the licensee on the question of his fault or liability for the accident. A procedural rule that may satisfy due process in one context may not necessarily satisfy due process in every case.
>
> * * *
>
> . . . [D]ue process requires that when a state seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective. (footnote omitted) (citations omitted). (emphasis in original).

Therefore, a prior adversarial hearing is necessary before unemployment compensation benefits are terminated because the issues to be determined involve a broad fault standard requiring the resolution of complex factual issues which are ill-suited for ex parte determination and unsuitable to be determined by simple documentary proof. *Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 40 L.Ed.2d 406, 419 (1974).[50]

[50]Of course, Mitchell, *supra*, involved property rights and a possessory interest in certain consumer goods. The principles therein enunciated are amplified by the instant case which involves entitlement to important governmental benefits mandated by Congress.

III.

THE PRESENT SEATED INTERVIEW SYSTEM FOR SUSPENDING OR TERMINATING UNEMPLOYMENT COMPENSATION BENEFITS VIOLATES DUE PROCESS SINCE THAT PROCEDURE DOES NOT PROVIDE FOR A HEARING BEFORE THE TERMINATION BECOMES EFFECTIVE.

A. The Appellant's Procedures Do Not Provide For An Adequate Hearing Before the Administrative Order Terminating Unemployment Benefits Becomes Effective.

The appellant's major contention in this case is that the procedures employed in the seated interview system, *in and of themselves*, provide adequate due process to the claimant. He has repeatedly admonished this Court not to look at any separate appellate procedure beyond the seated interview system. In his Statement of the Case, the Appellant maintains that the *only* form of a *de novo* review or appeal from a fact finder's decision in a seated interview is to the Unemployment Compensation Commission, a separate commission which the Appellant maintains:

> . . . is a completely independent entity *separate* and apart from the defendant and the Employment Security Division, and pursuant to §31-244 C.G.S., it prescribes its *own* regulations for the presentation and hearing of appeals.[51]

[51]Brief of the Appellant, at 5-6.

The Appellant re-emphasizes this point in an entire separate argument in his Brief entitled "The Appeal to an Unemployment Compensation Commissioner is a Matter Separate and Apart From the Hearing [Seated Interview]." There, he maintains:

In the argument portion of his brief, the Appellant steadfastly maintains that the present procedures, *in and of themselves*, provide adequate due process. In fact, the Appellant has fashioned an entire argument on the premise that it was reversible error for the District Court even to look beyond the "seated interview" system and assess the adequacy of the appeal process—the only process by which a claimant may obtain a de novo review.

With more insight than he perceives, the Appellant states the point precisely.

> The defendant's seated interview concerning a claimant's own activity during a two week period just ended constitutes a fair opportunity to be heard at a meaningful time and in a meaningful manner. Subsequent appeal for further hearings cannot dilute the fairness of the initial procedure.
>
> * * * *
>
> . . . Since it is the decision on appeal, however, *a decision which could take years* when considering the claimant's remedy of appeal from the defendant to the Commissioner, then to the Superior Court, and finally to the State Supreme Court, with intervening requests for reconsideration, such complaint and holding must fail.

As stated previously, the Connecticut Unemployment Compensation Commission is an entity separate and apart from the defendant-administrator and the Employment Security Division of the Connecticut Labor Department; it prescribes its own regulations for the presentation and hearing of appeals . . . Yet, it is the 'delay' which occurs while claimants' appeals are pending before this body which the lower court found to be one of the reasons why due process was not afforded the plaintiffs. . . . Defendant submits that such 'delays' cannot be attributed to the defendant *since he has no authority in the handling of these appeals*, and his only participation in same is by way of his being a party to each appeal filed.

Id., at 33 (citation omitted) (emphasis added).

Brief of Appellant, at 32-33 (emphasis added).

In recently rejecting the rationale of such a self-contained system of due process Mr. Justice Powell commented:

> It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann*. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily-created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace but by constitutional guarantee.
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> *Arnett v. Kennedy*, ___ U.S. ___, 40 L. Ed. 2d 15, 40 (1974) (opinion by Mr. Justice Powell, with whom Mr. Justice Blackmun joined, concurring in part and concurring in the result in part.)

Mr. Justice White also rejected the self-contained notion of due process in Arnett, *supra*, where he admonished:

> The rationale of the position quickly leads to the conclusion that . . . the requisites of due process could equally have been satisfied had the law dispensed with any hearing at all, whether pre-or post-termination.
>
> Arnett v. Kennedy, *supra*, 40 L. Ed. 2d, at 46. (Opinion of Mr. Justice White, concurring in part and dissenting in part.)

Indeed, the Appellant's position in the instant case has been rejected by a majority of this Court. *Cf.* Arnett v. Kennedy, *supra*, 40 L. Ed. 2d, at 63 (opinion of Mr. Justice Marshall with whom Mr. Justice Douglas and Mr. Justice Brennan concur, dissenting).

In interpreting a long line of cases, this Court has recently observed that many of them do not speak to

the issue of the need for a pre-termination hearing where a full and immediate post-termination hearing is provided. *See, Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 40 L. Ed. 2d 406, 415-16 (1974) (and cases cited in n. 10 therein). In this case, through his own brief, Appellant clearly admits that under his statutory scheme no post-termination hearing of any kind is provided. Moreover, the separate appeal process when examined by the District Court was found defective since the administrative decision is not reviewable *de novo* until an unreasonable length of time. *Steinberg v. Fusari*, 364 F. Supp. 922, 937-938 (1973), J.S.A. 24A. We submit that the acceptance of Appellant's position on this point alone would compel this Court to affirm the opinion of the District Court because of the overwhelming defects in the operation of the existing "seated interview" system. However, an examination of the separate appeals system will compel the same result.

As this Court has observed, "[W]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity for ultimate judicial determination of liability is adequate." *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931), quoted with approval in Mitchell v. W.T. Grant Co., *supra*, 40 L. Ed. 2d 406 at 416. In *Mitchell* the Court also noted, with respect to property rights in general, that "we have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective." *Id.*, quoting *Ewing v. Mytinger and Casselberry*, 339 U.S. 594, 598 (1950). In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), however, it was said that a procedural rule that may satisfy due process for

attachment in general is not one that would "necessarily satisfy procedural due process in every case," nor one that "gives the necessary protection to all property in its modern forms," quoted in Mitchell, *supra*, 40 L. Ed. 2d, at 417. As the Court in *Sniadach* observed, "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." 395 U.S., at 340. That unemployment compensation benefits also occupy a position as a specialized type of property need not be elaborated here. As this Court recognized in *Sniadach*, the seizure of an individual's wages could "as a practical matter drive a wage-earning family to the wall." Sniadach, *supra*, 395 U.S., at 341-42 (footnote omitted). The point here is that, as Mr. Justice White has accurately observed: "The impact of deprivation increases, of course, the longer the time period between the intial deprivation and the opportunity to have a full hearing." *Arnett v. Kennedy*, ___ U.S. ___, 40 L. Ed. 2d 15, 55 (1974). He further stated that:

> In Sniadach and Fuentes, there was no indication of the speed with which a court ruling on garnishment and possession would be rendered, and of course the ultimate issues on the merits in such cases must wait for a still later determination. In *Bell*, the issue of liability might not be determined until full trial proceedings in Court.
>
> Arnett v. Kennedy, *supra*, (opinion of Mr. Justice White, concurring in part and dissenting in part).

In the Connecticut scheme, the final administrative order terminating and suspending unemployment compensation benefits becomes effective immediately at the

seated interview and is later confirmed in writing.[52] Thereafter, the claimant is left to his own devices under a separate appeals system which the District Court found to entail an *average* delay of 126 days. Steinberg v. Fusari, *supra*, 934 F. Supp. 922, 934, J.S.A. 18A (emphasis added.)

As this Court has observed: "The formality and procedural requisites for the hearing can vary depending upon the importance of the interests involved and the *nature of the subsequent proceedings.*" *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (Harlan, J.) (emphasis added).

We turn then to consider the unreasonable time period between the initial deprivation and the opportunity for a full hearing.[53]

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[52] *See*, Stipulation to Facts, para 11., A. 38a, which recites:

> If, however, the claims examiner determines that he has not met the statutory requirements, the claimant does not receive his benefit checks and is told that he will receive written notification of the department's decision.

Cf. Ewing v. Mytinger and Casselberry, 339 U.S. 594, 598 (1950), cited with approval in *Mitchell v. W.T. Grant Co.*, ___U.S.___, 40 L.Ed. 2d 406, 416 (1974), where the Court stated: "[W]e have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective."

[53] As has been pointed out previously, no attack in this litigation was made upon the procedures employed in the eventual Commissioner's hearing. However, the sufficiency of the system is presently under attack. *See, Kohlbeck v. Loughlin, et al.*, Civil Action No. H-74-151 (D. Conn., filed May 13, 1974). There, the plaintiffs alleged *inter alia* that the Commissioners' appeal hearings extend beyond issues involved in the Department's initial determination, there is no right to confront or examine pivotal adverse witnesses and that the Commissioners' decisions are based either on issues not made known to the claimant before the hearing and not made the subject of the actual hearing or solely on hearsay introduced by representatives

B. The Average Delay of Well Over 100 Days For a De Novo Review and Decision Is Not An Immediate Post Termiantion Hearing.

In *Torres v. New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971), the court there found that the claimant's interests were measured by the possibility that he might have to live off his savings or welfare in the "few weeks" between termination and a full hearing. Those interests were found not to outweigh the governmental interest in accurate and unhurried determinations of eligibility, and the difficulties inherent in recouping mistaken payments. The factual situation of the Connecticut claimant in this regard is significantly different from that of the New Yorker to require a different result.

In *Torres* the record indicated that the average disputed compensation case took 45 days for determination. 321 F. Supp., at 439 (Lasker, J., dissenting). This period, then, is the "few weeks" during which the terminated New York claimant might have to rely upon savings or welfare, while awaiting his hearing on the merits of the termination issue. *Compare, Wheeler v. State of Vermont*, 335 F. Supp. 856, 861 (D. Vt. 1971) (three-judge court), where Judge Oakes viewed a five-week delay as "unreasonable."

It is abundantly clear that the relevant delays in Connecticut are far longer. The record indicates that of the 461 intrastate appeals disposed of in Connecticut during December of 1972, fully 414 took at least 101 days between the time an appeal was filed and the date

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of the Department. Thus, the contention that the Commissioners' system provides an adequate "fair hearing" is doubtful. Some aspects of this eventual Commissioners' hearing appear to have been changed by a recent statutory amendment. *See*, Conn. P.A. 74-339, effective July 1, 1974.

a final decision was reached. Put in percentage terms, this means that about 89.8% of all appeals took over 100 days to decide. And, the figures indicate that 61.4% of all appeals took over 125 days to dispose of, while 29.5% consumed over 150 days before the Commissioner's decision was rendered. Steinberg v. Fusari *supra*, 364 F. Supp. 922, 934:[54]

Thus, the opinion of the District Court observed:

> It may be one thing to find the claimant's due process claims insufficient in New York, where 45 days are consumed awaiting a decision in the average appeal, but it is quite another to do so in Connecticut, where the average delay is well over 126 days, or 18 weeks. And, while New York had Aid for Dependent Children programs available for those stuck by "brutal need" during the 45 day period, Connecticut with its average delay period of over 126 days, does not participate in the Aid for Dependent Children–Unemployed Parents Program.

364 F. Supp., at 934, J.S.A. 18A-19A. *See*, Stipulation to Facts, para. 39 (A. 43a).

[54] As the District Court stated:

> The above figures derive from an exhibit prepared by plaintiffs after detailed examination of Unemployment Compensation Commission records. Their accuracy is not challenged by the defendant Administrator. The figures cover the 461 intrastate appeals disposed of by written decision in December, 1972; interstate appeals, which involved obtaining work and wage records from the state of the claimant's prior residence, were not included as they generally involve even longer delays.
>
> The aggregate figures are as follows:

Days Between Filing of Appeal and Commissioner's Decision	Number of Appeals In Category	Percentage of Total
0-30	1	.2%
31-45	2	.4%
46-75	9	2.0%
76-100	35	7.6%
101-125	131	28.4%
126-150	147	31.9%
Over 151	136	29.5%
	461	

Steinberg v. Fusari, 364 F.Supp. 922, 934 n. 22 (1973), J.S.A. 18A.

Even compared to objective criteria, Connecticut's separate appeals process does not provide for an "immediate" post-termination hearing. In fact, a comparison of Connecticut's delay period for deciding Unemployment Compensation appeals with the rest of the nation reveals its truly deplorable condition and negates any concept that this separate appeal procedure provides an immediate post-termination hearing. During the calendar year 1973, for example, Connecticut decided only 5.3 percent of its Unemployment Compensation appeals within thirty days, the lowest percentage in the nation. During the same period, Connecticut decided only 15.5 percent of the appeals within 45 days, the lowest percentage in the nation. In total, Connecticut decided only 31.4 percent of *all* appeals within 75 days from the date of filing, again the lowest percentage in the nation.[55] Thus, in

[55] *Unemployment Insurance Statistics*. "Table 17B-Appeals Decisions Under State Programs, Time Lapse Between Date of Filing Appeal and Date of Decision, January-December 1973," U.S. Department of Labor, Manpower Administration (April, 1974) (hereinafter U.I. Stat.)

Indeed, even compared to the national averages in the same table Connecticut's separate appeal process is wholly inadequate:

Connecticut in calendar year 1973 a full 68.6 percent of all appeals from the denial of Unemployment Compensation benefits to the separate appeals system took over 75 days to decide, during which time the benefits in question were held by the Appellant.

Percentage figures do not provide the full story since, taken alone, they do not adequately reflect the human element. In the month of January, 1973, the appeals of 506 individuals were decided of which 503 took over 75 days; in the month of February, 1973, the appeals of 528 individuals were decided of which 521 took over 75 days to decide; in March, 1973, the appeals of 685 individuals were decided, of which 676 took over 75 days to decide.[56]

January - December, 1973
Appeals - Percent Decided Within

	30 Days	45 Days	75 Days*	Remainder Undecided
Connecticut	5.3	15.5	31.4	68.6
National Average	43.2	63.6	80.5	19.5

* In this table each appeal includes the prior one. Thus, the 75 day figure includes the previous percentages.

[56]The Connecticut state Labor Department must submit a "Form ES-221" entitled "Benefit Appeals" to the United States Department of Labor on a monthly basis. That form provides information about the time lapse between the date of filing an appeal and the date of mailing the Commissioner's decision. The time lapses are broken into four categories: 0-30 days, 31-45 days, 46-75 days, and over 75 days. (Compare the more detailed breakdown for December, 1972, in note 54, *supra*). The following table represents the figures presented for intrastate appeals in the three most recent months for which data was submitted to the District Court.

Number of Days	March, 1973	February, 1973	January, 1973
0-30	3	0	0
31-45	4	1	0
46-75	2	6	3
Over 75	676	521	503
Total	685	528	506

See, Steinberg v. Fusari, 364 F.Supp. 922, 934 n. 23 (1973), J.S.A. 18A.

As the District Court concluded:

> If the appropriate weighing of governmental interests against those of the individual is really a case by case process, *see Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961), it seems patent that the results of the weighing process employed in *Torres* are inapplicable here.
>
> *Steinberg v. Fusari*, 364 F. Supp. 922, 934 (D. Conn., 1973), J.S.A. 19A.

Coupled with this, the District Court also found that a significant number of claimant appeals from the "seated interview" decision result in reversals of the original decision. For example, the District Court found a reversal rate of 26.1% for the year July, 1971 to June, 1972; 26.0% for the period of July, 1972 to October, 1972; and 19.4% for the period of January, 1973 through March, 1973. *See, Steinberg v. Fusari*, 364 F. Supp. 922, 936-37 n. 28 (1973), J.S.A. 22A.

Thus this Court must conclude that the Appellant's procedures violate due process since they provide for no post-termination hearing of any kind. Further, even considering the separate appeals procedure to the Unemployment Compensation Commission, the unreasonable delays in that process combined with the substantial reversal rate compel this Court to conclude that Connecticut does not provide for an "immediate" post-termination hearing in any constitutionally meaningful sense of that term.

C. Adequate Procedures To Provide Claimants Due Process Not Only Exist But Are Already In Use By The Appellant in Certain Limited Instances.

Once this Court determines that prior notice and hearing are required it need do no more than order the Appellant to apply the prior notice and adversarial hearing he now uses in certain limited cases to all claimants before their continued unemployment compensation benefits are withheld. *See,* Appellant's "Proposed Consent Order," A. 149a.

As the District Court found, the Appellant conforms to the requirements of due process in at least two instances. If an employee of the State Employment Service Department (which refers claimants to possible job openings)[57] has provided information that a claimant has refused to accept a job referral, notice is sent to the claimant scheduling a hearing for a date and time certain and advising claimant of the reason for the hearing and of his right to bring counsel and witnesses.[58] The claimant then has the right to confront the Employment Service employee at this hearing. In

[57]The Connecticut Department of Labor contains the Employment Security Division which deals with unemployment and is subject to the supervision of the labor commissioner as administrator. (*See,* Conn. Gen. Stat. §§31-237(a), 31-222(a). The Employment Security Division is divided into two departments, the Unemployment Compensation Department and the Employment Service Department. Conn. Gen. Stat. §31-237(a).

[58]If the claimant is scheduled to appear for a regular bi-weekly visit within two days, the notice is given to him personally then. The claimant can ask for an immediate hearing on that date, or can wait approximately five days for a hearing. If he opts for the latter course, he is routinely given his benefit checks.

the routine case, benefits continue until the hearing is held. Similarly, if information concerning the refusal of a suitable job comes from an interested employer—one whose "merit rating" account has been charged because of the termination of the claimant's employment[59]—notice of a proposed hearing is sent both to the claimant and the employer, and a procedure similar to the one above is followed. *Steinberg v. Fusari,* 364 F. Supp 922, 925-26 (1973), J.S.A. 4A.

These two "deviations," as termed by the District Court, from the "seated interview" system were soon joined by a third in the Department's change of position prior to trial with respect to Cecil Paskewitz, a named plaintiff below.

Paskewitz had been determined initially eligible and began receiving weekly benefits for a twenty-six week period from August, 1971 to February, 1972, at which time he applied for extended benefits in accordance with Conn. Gen. Stat. §31-232b., *et. seq.*, and was approved. However, when he went in March, 1972, to receive his extended benefits check he was told that the Department had discovered that a mistake had been made in August, 1971, in computing his wage credits and he was now deemed no longer eligible and would not receive further benefits.[60] He appealed.[61]

[59]Employers' contributions to the unemployment compensation fund are determined through the operation of a "merit rating" index system. Conn. Gen. Stat. §31-226. *Inter alia,* the system operates to charge the employer's account for those claimants whose employment was terminated by him, and credits the employer for prompt rehiring of separated employees.

[60]For a more detailed description see Amended Complaint, paras. 18-20, A. 16a, and Stipulation to Facts, paras. 34-37, A. 42a-43a. Steinberg v. Fusari, *supra,* at 926-27 n. 15, J.S.A. 5A-6A.

[61]Paskewitz's appeal hearing to the separate appeals commissioner was held on October 11, 1972. To date no decision has been rendered. *See,* Stipulation to Facts, para. 37, A. 43a.

By letter to the District Court dated May 18, 1973,[62] the appellant stated that while the Paskewitz case involved a relatively automatic determination which is based solely on whether or not the claimant has sufficient wage credits, he conceded

> . . . we now recognize that redeterminations are sometimes necessary because of error or misinformation, and that due process would not be given such a claimant unless he were given a hearing.
>
> * * * *
>
> Accordingly, the defendant now concedes in this case that its former policy in not providing a hearing in such cases may violate the due process clause of the 14th Amendment to the Constitution. . . . The defendant, therefore, effective immediately is changing its policy so that when such questions arise in the future, unemployment compensation benefits will continue to be paid until a written notice is sent to the claimant notifying him to appear at a place, date, and time certain for a hearing, and advising him of the particular issue raised, and of his right to be represented by counsel.
>
> A. 147a-148a.

The Appellant also submitted to the District Court a "Proposed Consent Order" in which he went even further by stating that the above due process hearing be provided:

> Whenever the defendant has reason to believe that a re-determination must be made either as to the question of entitlement itself or as to *any change* affecting the amount of unemployment compensation benefits, then before such a change can become effective, written notice of a hearing at a

[62]Reproduced at A. 147a-148a.

> place, date and time certain must be sent to the claimant at his last known mailing address, said notice apprising the claimant of the issue or issues to be raised at said hearing, and advising him that he may be represented by counsel at said hearing, and a written notice of the decision after said hearing must be mailed to the claimant.
>
> A. 149a.

If, as the appellant has conceded, even in relatively simple calculations, due process would not be afforded without prior notice, a hearing and representation, we find inconsistent and disingenous that such a hearing is not required when complex factual issues based on a broad fault standard are involved. Indeed, since 60 to 70 percent of the suspension of Unemployment Compensation benefits involve those very issues, the only reason for not providing the prior hearing must be an arbitrary exclusion based on some kind of notion of "administrative convenience." It is now virtually axiomatic that with respect to the nature of the interests here involved, "the Constitution recognizes higher values than speed and efficiency." *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 656 (1972).[63]

[63]Appellant's rough analogy to the Parable of the Laborers in the Vineyard (Matt. 20: 1-16), misses its mark. He states: "Put another way, just because one does something which he does not have to do, for one person, does not mean that by so doing he necessarily must do the same for everyone." (Brief of Appellant, at 17-18.) In the Parable, even the first laborers hired were treated with fairness since at the end of the day they received the full amount they were due. In the instant case, the Appellant's conceded requirements of due process arbitrarily applied to some claimants and not to others belies this comparison. The Constitution provides that under the due process clause, each person is entitled to be treated fairly under the law.

The fact that the Appellant, under the same statutory umbrella, provides for a full due process hearing for some claimants also

In sum, this Court need only articulate for all unemployment compensation claimants the standard the Appellant already applies to limited cases, and require that whenever the Appellant has reason to believe that a re-determination must be made either as to the question of entitlement itself or as to *any* change affecting the amount of unemployment compensation benefits, before such a change can become effective, written notice of a hearing at a place, date and time certain must be sent to the claimant at his last known mailing address, the notice apprising the claimant of the issue or issues to be raised at the hearing, and advising him that he may be represented by counsel at the hearing, and that he has a right to cross-examine pivotal adverse witnesses, and that a written notice of decision must be mailed to him after the hearing.

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raises an equal protection issue. *See, e.g. Bell v. Burson*, 402 U.S. 535, 540 n. 4 (1971), *Carrington v. Rash*, 380 U.S. 89 (1965). It is not enough to say that the state has the power to treat different classes of persons in different ways, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); the classification must be reasonable, not arbitrary and rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co., v. Virginia*, 253 U.S. 412, 415 (1920). In the instant case unemployed workers in Connecticut are treated differently at the whim of the Administrator.

IV.

APPELLANT'S PRESENT "SEATED INTERVIEW" SYSTEM BASED ON A BROAD FAULT STANDARD, WHICH DENIES A CLAIMANT ADEQUATE NOTICE, AN OPPORTUNITY TO CONFRONT ADVERSE WITNESSES TO CONSULT WITH COUNSEL AND WHICH PERMITS THE FACT FINDING EXAMINER TO GO BEYOND THE RECORD OF THE "SEATED INTERVIEW" TO DECIDE ISSUES FOR CONTINUED RECEIPT OF UNEMPLOYMENT COMPENSATION BENEFITS DENIES CLAIMANTS DUE PROCESS OF LAW.

A.

It is undisputed that in the Connecticut system the seated interview takes place on the same day the Department questions a claimant's continued eligibility, and that if the Department is dissatisfied with the claimant's performance or explanation the benefits are withheld until the claimant's case is decided by a separate appeals commission. *See*, Stipulation to Facts, paras. 9-11, A. 38a.

As this Court recently held in *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (opinion of Mr. Justice Stewart joined by Mr. Justices White, Rhenquist and Blackmun):

> . . . the welfare recipients in Goldberg v. Kelly, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Mr. Justice Stewart's opinion in *Roth* quoted with approval an opinion by Mr. Chief Justice Taft in

Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926), (disposed on other grounds), in which he stated that the existence of the Tax Appeal Board's eligibility rules defining who may practice before it gave the petitioner an interest and a claim to practice there to which procedural due process requirements applied. Board of Regents v. Roth, *supra*, at 576 n. 15. Mr. Chief Justice Taft stated that the tax board's discretionary power to decide who may practice before it "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such notice, hearing and opportunity to answer for the applicant as would constitute due process". Goldsmith, *supra*, at 119.

In the case at bar, the District Court (after a review of all the evidence with respect to Connecticut's system of terminating Unemployment Compensation benefits), concluded that the "claimants are provided with virtually no advance notice of the interview or the precise issues involved and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf." Steinberg v. Fusari, *supra* 364, F. Supp. 922, 935: J.S.A. 20A.

The Appellant contends that "[h]ere the claimants did have notice, constructive notice at the very least . . ." because they were given a booklet and because of their experience in filing continued claims. Brief of Appellant, at 28.

In *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915), this Court stated: "Nor can extra-official casual notice, or a hearing granted as a matter of favor or discretion be deemed a substantial substitute for the due process of law that the Constitution requires."

The soundness of this doctrine has been repeatedly recognized by this Court. In *Security Trust & S.V. Co.*

v. Lexington, 203 U.S. 323, 333 (1906), the Court (with respect to an assessment of back taxes), stated:

> If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute.

In *Central of Georgia R. Co. v. Wright*, 207 U.S. 127; 138 (1907), this Court said, " . . . notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace." *Cf. Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970); *Wolff v. McDonald* ___ U.S. ___, 42 U.S.L.W. 5190, 5198 (1974).

A brief review of how the actual seated interview system operates, as done by the District Court, will bring the myriad of defects going to the lack of adequate due process into sharper perspective.

Section 31-235 of the Connecticut General Statutes defines eligibility for unemployment compensation, *inter alia*, as " . . . he is physically and mentally able to work and is available for work and has been making reasonable efforts to obtain work." J.S.A. 26A.

The department defines "available for work" and "reasonable efforts" for continued eligibility as follows:

> "AVAILABLE FOR WORK." You must be ready, willing and able to take any suitable job on a full-time basis.
> "REASONABLE EFFORTS TO FIND WORK." Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work. A. 250a.

However, the issue of what constitutes "reasonable efforts to obtain work" and "availability" is not a simple one but involves a broad fault concept and has caused the Department no small consternation. In 1956, the Employment Security Division issued a lengthy memorandum, a portion of which was entitled "What constitutes 'Reasonable Efforts?' "[64] Therein, the Department stated that "... reasonable efforts are such efforts as one would ordinarily expect anyone to make who is honestly looking for work." Such effort, the memo states, depends on several *varying factors*—labor market conditions, the claimant's physical condition, the length of a claimant's unemployment, the extent to which the claimant's union serves as a exclusive hiring agent, potential sources of employment in the area, and depressed economic conditions. (emphasis added.) Yet, there is no indication that much or any of this information is made available to the "fact finding examiners." *See,* Deposition of Elenor H. Smarz, discussed *infra*, A. 80a-81a. As early as 1953, the Department attempted to clarify the issue of "availability" in an attempt to remedy abuses of the seated interview system. In a memo dated May 19, 1953 (A.123a) the Department stated it had "observed numerous local office decisions denying benefits for restricted availability which cannot be said to be supported by the facts appearing on the accompanying fact finding reports." The memo went on to state that:

> These are cases in which the findings of fact as prescribed in the fact finding report raise nothing more than a mere inference or an implication that the claimant is imposing a restriction on her availability—and it must be remembered that a

[64]Reproduced at A. 117a.

> decision based on inference or implication is as vulnerable as a decision based on presumption. The fact finding reports in these cases are completely defective since they do not contain complete coverage of the question whether an actual restriction exists, and, conversely, the decisions are questionable since they are not supported by the facts appearing in the fact finding reports.
>
> The mere fact that the claimant believes herself to be entitled to at least $1.15 an hour cannot compel a sound conclusion that the claimant *will not* accept employment which pays less than the figure. Hence, her statement does not support a conclusion that she has imposed a restriction on her availability. (emphasis in original).

The claimant, faced with these presumptions and defects in the present "seated interview" system, is at the mercy of the fact finding examiner. It is submitted that the "seated interview" is the method least calculated to allow a claimant to present his side of the case. *See, Green v. McElroy,* 360 U.S. 474 (1959); *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

The Department's confusion over the standards of the "availability" for work issue continued and, in 1956 by memo[65] dated April 16 (A. 127a-128a), the Department observed that:

> Fact finding reports in cases in which the claimant has been denied benefits because of a restriction on his availability are frequently found to lack such facts as are necessary to show that the restriction in question is an unreasonable

[65]Connecticut, unlike many other states, does not have a unified policy manual for Unemployment Compensation. Consequently, Departmental policy is contained in a loose collection of memos or Policy Letters extending over a wide number of years subject to varying interpretation. *See,* Testimony of Eleanor Smarz, A. 85a-86a.

one – that the nature of the restriction is such that it constituted a serious and substantial impediment to claimant's employability. In such cases, the conclusion reached and declared by the examiner is vulnerable since it is not supported by facts in the fact finding report. This type of situation points up a need for improvement in the process of recording the facts, if not in the interviewing technique.[66]

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[66]See, A. 127a-128a. Indeed, this memo goes on to observe:

2. Evaluation of the fact finding reports discloses the following areas of inadequacy which require special attention.

a. Clarity of presentation

There is still a tendency on the part of some examiners to report facts in fact finding reports with a degree of vagueness and indirection with the result that, where this occurs, facts in the fact finding reports are not articulate and precise. There is an urgent necessity for required facts to be recorded in fact finding reports in direct, unequivocal, and positive language so that there is no room for conjecture as to the meaning or purpose of such facts in relation to the whole case.

b. Sufficiency of facts

This is found to be a problem particularly in cases involving quits and restricted availability.

Where there is an intimation that the claimant quit his job for more than one reason, one disqualifying and the other not, the contents of fact finding reports in such cases often suggest a failure by the examiner to explore the surrounding circumstances with a view toward determining which was the motivating reason for the quit. There is room for improvement in interviewing technique in this area.

* * * *

c. Exhaustion of Sources, Rebuttals, etc.

The requirement of an opportunity for rebuttal is too often ignored in cases in which claimant and employer have offered inconsistent versions of the circumstances of a separation. This area is one of vital importance and merits close attention and correction since the validity and propriety of decisions is often affected by the denial of an opportunity for rebuttal.

It is submitted that the fault is not in the "interviewing technique" but in the system of a "seated interview" where the fate of the claimant is wholly dependent upon the "fact finder" rather than in a due process hearing where facts can be adequately presented and adequately developed.

The Department memo to fact finding examiners dated May 13, 1959 (reproduced at A.129a) is illustrative of the need for an adequate due process hearing. It states:

> The "Comment" section of the fact finding report form is intended to afford the fact finding examiner an opportunity to include in his report any material which in not factual and therefore is not a part of the factual content of the report itself but which may have been utilized by the examiner in the process of arriving at his decision. For example, the "Comment" section may quite appropriately carry the examiner's personal remark concerning a doubt in his mind to the claimant's credibility and an explanation of the reason for that doubt.

The seated interview is inadequate due process since it takes an unrepresented claimant, without notice, and puts him at the peril of his own presentation and his own appearance.

What this series of memoranda shows is the serious defects in the seated interview process. The failure to adequately state and develop the facts is due in no small way to the quandry, inarticulateness and even poor appearance of the unrepresented claimant who must submit to a "seated interview" without notice. We maintain that the "seated interview" is a system replete with inherent defects against a fair presentation of the claimant's case.

Without the right to confront not only adverse witnesses, but the sufficiency of the "seated interview" policies and procedures themselves, a claimant is often

powerless to rebut charges made against him for, as this Court recognized in *Green v. McElroy*, 360 U.S. 474 (1959), a claimant is at the mercy of "individuals whose memory may be faulty or who, in fact, might be perjurers or who are motivated by malice, vindictiveness, intolerance, prejudice or jealousy. Green, *supra*, at 487. *See also, Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970).

Two other Department memos covering a short period between October – November 1972, a time of peak unemployment in Connecticut and the nation, illustrate the vulnerability of the present seated interview system and underscore the immediately preceeding comments.

By Department memo dated October 6, 1972 (reproduced at A.131a) all Local Office Managers were advised that:

> Claimants are to be fully advised of their rights, informed clearly and unequivocally what section or sections of the law are involved, and they should be informed of what they are expected to do by way of job search and exposure to the labor market. This is not to say the claimants should be told how to "beat the system," but a claimant under the law, as interpreted by many court decisions, is entitled to know the law and know why he or she is being declared ineligible or disqualified for benefits.
>
> If a person restricts his availability or indicates a job type preference which turns out to be restrictive, the claimant should be told that he or she could disqualify himself or herself.

Slightly more than a month later, fact finding examiners had to be again admonished by policy memo dated November 16, 1972 (reproduced at A. 123a), in the following manner:

> A directive was previously issued requiring local office personnel of both ES and UC to advise claimants and clients when their conversation, course of conduct, or other acts or omissions may result in disqualification or declaration of ineligibility. Since the directive has been issued, there have still been instances where, for example, senior citizens were not advised that their Social Security restrictions would result in disqualification and where geographical preferences, as opposed to restrictions, resulted in disqualifications. Please reemphasize that we are here to serve the public and to properly administer the law and that proper administration requires complete candor and fairness with all.
>
> Questions should not be phrased with a result in mind. If, during questioning, a claimant appears to be unaware of the applicable provision of the law, he should be advised of it.

This memo concludes significantly that: "[L]ocal office managers and fact finding examiners are requested to comply with Mr. Eisenman's directive to the fullest extent and *without further delay*." (emphasis added). Thus, we have come full circle from the Department memo of May 19, 1953, and what these policy memos point out is that the problems in the seated interview system are inherent and permanent – the system is malignant.

As this Court has stated, "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Further, as this Court has stated:

> In the present context these principles require that a recipent have timely and adequate notice detailing the reasons for a proposed termination and an effective opportunity to defend by

confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.
Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (footnote omitted).

B.

A comparison of the testimony of Department Officials Theodore Hatcher and Eleanor Smarz deals the fatal blow to the Appellant's contention that the "seated interview" is a relatively simple procedure which needs no due process safeguards. It will show further that there is substantial difference on crucial substantive and procedural points even within the Department itself, a difference which goes to the heart of the lack of adequate due process afforded the claimant.[67]

Theodore Hatcher is the Unemployment Compensation Director for the State of Connecticut. Eleanor Smarz has been employed by the Department for approximately 25 years and is presently the Manager of the Bridgeport Unemployment Office. (S: A.49a, 59a, 60a).[68]

[67] As the District Court correctly observed:

Of course, the formulation of an appropriate system is in the first instance a responsibility of the defendant Administrator. But when an administrator is making as subjective a determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to fairly and completely present his side of the case and to meet any unfavorable evidence. This the present system does not do.

Steinberg v. Fusari, 364 F.Supp. 922, 936 (1973), J.S.A. 21A-22A.

[68] By stipulation all parties agreed that the deposition of Mrs. Smarz was admissible as evidence of Department policy (*See*, A. 46a.).

Both Hatcher and Smarz agreed in their testimony that a question of eligibility arising in the claim line will lead to a seated interview. (H: A.165a; S: A.52a). Both also agreed that the seated interview involves the determination of complex factual issues (H: A.171a; S: A.72a-80a, 84a-85a), applying a broad, and in some cases, a difficult statutory standard (H: A.172a; S: A.84a), and often relying on third-party information. (H: A.171a, 18a-181a; S: A.55a). The first substantial difference, however, arises as to the weight given to the information supplied by a third party not required to be present at the seated interview. (H: A.186a).

On this point Hatcher maintained that if a question arises which needs the confirmation of third-party information, and that third-party cannot be contacted there at the seated interview "... there is a[n] [unwritten] policy throughout the Department that the claimant gets the benefit of the doubt." (H: A.180a-181a). Mrs. Smarz testified though, that if the third-party cannot be contacted, the claimant may or may not get benefits "... depending upon what the other circumstances there are involved, in a situation." (S: A. 44a.) She said that in many instances the claimant is given the benefit of the doubt, but continued "... its difficult to give you a direct yes or no answer to any of these instances because I do not know the exact circumstances of the case." (*Id.*) This difference is important because as Hatcher maintained, he could not think of any other major reasons for

For convenience, the testimony of each will be cited directly in the text by the corresponding letter designation of "H" or "S" followed by the appropriate page number of the Single Appendix. Longer quotations, however, will be cited in the footnotes.

disqualification that did not categorically involve third-party information. (H: A.186a-187a).

Both agreed that one of the major factors in a claimant's disqualification arises from disputes over his "reasonable efforts to find work." (H: A.187a; S: A.53a). As to what factors must be taken into account, Mr. Hatcher testified, "Well, the condition of the labor market, the individual's job classification, the claimant's exposure up to this time to the job market, if the individual has already exhausted the job potentials in the area, all of this has to be taken into consideration." (H: A.187a).

The exchange on the same point with Mrs. Smarz took the following form:

> Q. In order to handle it on an individual case, to make a fair determination on an individual case, the fact-finding examiner would have to know quite a bit about the claimant, would he not. He'd have to know the man's background, the size of his family, his past work record, how badly he needs employment, what type of man he is, his physchological makeup, he would have to know quite a bit, wouldn't he, to make an individual determination? What is reasonable for that man might not be reasonable for another man, isn't that right?
>
> A. Well it's impossible to know all that about an individual as far as that's concerned, but the type of work that he's seeking and something about his background in that particular work and where it's available and what efforts he has made to get that type of work would be my main concern.
>
> Q. There is in fact, no written list of all of the factors which might influence a decision on whether a reasonable effort to find work has been made, isn't that correct?
>
> A. Not to my knowledge.

> Q. And in fact, such an exhaustive list would probably not be possible, would it, since there are so many factors which might influence a particular determination by a fact-finding examiner?
>
> A. That's true.[69]

On the question of what is "reasonable effort" to find work Mrs. Smarz testified that it is not specifically defined anywhere to her knowledge. (S: A.76a). Mr. Hatcher testified that he thought it meant "[t]hat the individual [must] do what can reasonably be expected of him to try to find work if he is truly attached to the labor market. . . ." (H: A.188a).

Both Department Officials agreed that the condition of the labor market is one of the important factors in the determination of a claimant's "reasonable efforts." (H: A.187a; S: A.80a-81a). A critical difference arises though on the question of whether the fact finders are ever made aware of the condition of the labor market. Mr. Hatcher testified that he is "sure" this information is made "available" to them. (H: A.189a.) Mrs. Smarz offers a more incisive view:

> Q. . . . was that information passed on to the fact-finding examiners during each month? Are they informed of what the unemployment rate is?
>
> A. No.
>
> Q. They're not?
>
> A. Not the percentage figure, no.
>
> Q. In the policy claims letter referred to earlier dated October 22, 1956,[70] it states that it is not

[69] S: A. 84a-85a.

[70] Reproduced at A. 117a.

intended to require claimants to make futile trips to employers' hiring halls just for the sake of building up a record of job seeking when there are not many jobs available. Do your fact-finders take into account the job market when they're making a determination as to reasonable effort?

A. To a certain extent.

Q. But they are not given the information on a regular basis of what the economic indicators show for availability of jobs?

A. Well they may have a general idea, in discussion, but I don't actually give them the information on a percentage basis, the actual statistics.

Q. So that you're not sure to what extent they take into account on their fact-finding decisions?

A. (unintelligible).

Q. Have you ever seen it [the condition of the job market] described as one of the factors that influenced the decision of a fact-finder when he writes his fact-finding report, as being the basis for his decision, or one of the factors?

A. Not that I remember.[71]

A third crucial difference which affects the lack of due process afforded a claimant by the "seated interview" arises when we try to ascertain the Department's actual standards regarding the U.C. 45 form. As a condition of continued eligibility, a claimant is required to submit a completed U.C. 45 which lists the dates and the places he has gone seeking employment.[72] This is examined at each benefit period and if a problem arises, he is required to have a "seated

[71]S: A. 80a-81a.

[72]Reproduced at A. 121a-122a; *See also*, Stipulation to Facts, para. 8, A. 37a.

interview." There is a critical difference in testimony as to how many places of prospective employment a claimant must list on his U.C. 45. In response to a question as to whether a statewide policy exists on this issue, Mr. Hatcher testified that it is an [unwritten] state policy that three places a week [six in a two-week benefit period] are required. (H: A.190a-191a, 192a). Mrs. Smarz, though, indicates an awareness of no such policy (S: A.54a), and testified that a seated interview may be necessary regardless of the number of places listed on the U.C. 45 when a question *about* those places arises in the mind of the claims examiner. (S: A.75a).

Substantial differences also exist as to whether or not the claimant is ever informed that the standard is three places a week. At trial the following exchange between the court and Mr. Hatcher took place:

JUDGE NEWMAN: Is the claimant ever told that three is the magic number?

THE WITNESS: Yes.

JUDGE NEWMAN: When does he find that out?

THE WITNESS: He is told that on his benefit rights interview. He is told that when he is handed the work effort form.

* * * *

JUDGE NEWMAN: He is told that three a week is enough?

THE WITNESS: Yes.[73]

In answer to a similar question, Mrs. Smarz testified:

A. It was not an official notification that they were to tell these people, if that is what happened.

[73]H: A. 193a-194a.

But this is, there's no official number or anything in reference to this.

* * * *

Q. So in fact one claims examiner, I mean fact-finding examiner, might feel that six places spread evenly over two-weeks is a reasonable effort. Another fact-finding examiner might feel that eight is a reasonable effort, or ten is a reasonable effort, isn't that correct?

A. Well I can't tell you what the fact-finding, how the fact-finding examiner feels because I don't know all the circumstances for this specific case that you're referring to. There's more involved in these situations other than just the fact that this man went out to look for a job. Or that he has listed six or ten or twelve places to seek employment because there's many other factors that are taken into consideration also.

(S: A. 87a, 90a).

On cross-examination, however, Hatcher stated that the three places was a rule of thumb and that the "quality of effort" rather than the quantity is the controlling factor. (H: A.208a). As to whether or not claimants received a benefits rights interview (to inform them of their rights and obligations), Mrs. Smarz testified as follows:

Q. . . . I understand your earlier testimony that there was, at least some period when not everyone received a benefit rights interview?

A. During the crush period . . . [June and July] . . . At that time did everyone get a benefit rights interview? They couldn't.

(S: A.94a).

As the District Court concluded:

Thus serious questions arise about whether a claimant can ever meet a burden of proof based on

a "rule of thumb" that he has never heard of? Indeed, even Mr. Hatcher conceeded that in "crush periods" not everyone receives a benefit rights interview, at which the information is supposedly imparted.

Steinberg v. Fusari, 364 F.Supp. 922, 935-936 n. 25 (1973); J.S.A. 20A-21A.

Indeed, this confusion within the Department itself illuminates the fallacy of the Appellant's basic contention that ". . . it is the claimant alone in most cases who knows in advance what issues will be raised when he reports . . . "Brief of Appellant, at 21. Appellant's argument was in fact rejected by the District Court when it said:

The claimant surely cannot be expected to bring counsel and witnesses to every bi-weekly claims session, on the off chance that a "seated interview" will result. Nor can the claimant be certain in advance of the subject matter of the interview. While questions involving reasonable efforts at finding work are most common, "seated interviews" can and do involve numerous other grounds for possible disqualification. *Cf.* Conn. Gen. Stat. §31-236.

Steinberg v. Fusari *supra*, at 935 n.25; J.S.A. 20A.

What this foregoing comparison shows is that first, the Department is and has been operating a "seated interview" procedure at which the claimant must appear without notice or representation to joust for his Unemployment Compensation benefits which he and his family so desperately need. The procedure is in fact not an "interview" but is an adversary proceeding with the full investigative resources of the Department brought to bear on the claimant. Indeed, the claimant is the

only party not adequately represented.[74] Secondly, the Department has been operating this procedure without adequate standards or safeguards and indeed is in conflict with itself. Thirdly, as this comparison shows, the present procedure is not operating as smoothly and as equitable as the Appellant would have this Court believe. Lastly, all the factual evidence in this case shows a necessity for this Court to require an adequate due process hearing before a claimant's Unemployment benefits can be suspended or terminated.

The affidavits of the Appellees Juan Miranda and Delia Triana speak precisely to this point and reflect what happens to an unrepresented claimant at the seated interview which the defendant claims provides "enough due process." Mr. Miranda states:

> I speak and read very little English. At no time was any explanation given to me either in Spanish or English by anyone at the unemployment office as to what my responsibilities were in making efforts to find work.
>
> * * * *
>
> I was told I had not visited enough prospective employers and was not given a chance to rebut this allegation.
>
> * * * *
>
> I have been without income for myself and my family since my unemployment benefits were terminated in August. I have no present means of supporting my family, other than handouts from other people. I am unable to pay my rent and I am unable to buy enough food for my family. I

[74] As this Court noted: "his impaired adversary position is particularly telling in light of the welfare bureaucracy's difficulties in reaching decisions on eligibility. *Goldberg v. Kelly*, 397 U.S. 254, 264 n. 12 (1970). This is no less true in Connecticut where the District Court found a reversal rate of 19-26%. *Steinberg v. Fusari*, 364 F.Supp. 922, 936-937 n. 28 (1973); J.S.A. 22A.

> have tried to find work everywhere but the jobs are not there.
>
> Each two weeks since my benefits were terminated I have gone to the Unemployment Office and showed a fully completed form U.C. 45, showing the places I had looked for work during the two weeks. Each time the worker barely looks at the card and tells me I get no checks. Sometime the worker tells me to wait until my initial appeal is heard. On October 11, 1972 as I testified at my appeal hearing on October 17, the worker would not even take my written statement as to my efforts to find work.[75]

As the Appellee Delia Triana states:

> I do not understand written or spoken English and since the unemployment office did not supply an interpreter on the occasion of my visits, I was required to bring and was told to bring my own interpreter. I was required to bring one of my young children to the unemployment office when I visited.
>
> In early July, I was told, through my child interpretering, that I must take one of the forms that was given to me and get prospective employers to sign the card indicating I had visited and asked for employment.
>
> I had the cards signed by several employers during the period after July 10th, 1972 but on both occasions when I went to the unemployment office (at two weeks intervals) I was told that not enough employers had signed the card. I did not fully comprehend what was being asked of me and again asked for an interpreter and was told to get one for myself.

[75] Affidavit of Juan Miranda, September 6, 1972; Supplementary Affidavit of Juan Miranda, October 18, 1972. *See*, A. 139a-142a.

> In late July, I was told that I should have six employers sign the card. My next appointment at the unemployment office was on August 7th, 1972 and on that occasion my card had been signed by six employers stating that I had applied for work at their offices.
>
> On August 7th, 1972 I was again refused an unemployment check and was told that while I had six employers sign the card, they had all signed the card on the same day and that this disqualified me for unemployment benefits since I had not spread the six employers out over the two week period. I tried to explain to the officials that since I did not speak English, I could only go on Fridays when one of my children could accompany me to do the interpretering, I was told that this was unsatisfactory and that I was disqualified indefinitely from receiving benefits from July 9th, to an indefinite period because I had not used "reasonable effort" to find employment.[76]

To conclude, the function of notice is to inform the recipient of the nature of the evidence against him in advance of the hearing that he may have an adequate opportunity at the hearing to contest its accuracy. *See, Morgan v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 314 (1950).

As this Court stated long ago:

> It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose . . . [A] man should not be required . . . instantly to answer a charge . . . on the same or even the next day and should be allowed not only applicable time to obtain legal advice and assistance, but also to

[76]Affidavit of Delia Triana, September 12, 1972. See, A. 135a-136a.

> collect his evidence; and even the convenience of witnesses should be considered; and therefore in general several days should intervene between time of [notice] and hearing.
>
> *Roller v. Holly*, 176 U.S. 398, 409-410 (1900).

Goldberg further recognized that "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnessess." ***Goldberg***, *supra*, 397 U.S., at 269-270. But at the Appellant's "seated interview," a recipient is allowed no opportunity to confront and cross-examine the many outside sources whose information may be the basis for his disqualification. As this Court stated in *Green v. McElroy*, *supra*, at 497-498:

> . . . [T]he requirements of confrontation and cross-examination . . . have ancient roots. They find expression in the Sixth Amendment . . . This Court has been zealous in protecting these rights from erosion . . . in all types of cases where administrative . . . actions were under scrutiny . . . (citations omitted).

Goldberg also specifies that a terminated recipient is entitled to an "impartial decision maker" and a decision "resting solely on the legal rules of evidence induced at the hearing." *Goldberg*, *supra*, 397 U.S. at 271. In the case *In Re Murchison*, 349 U.S. 133 (1955), this Court held that due process requires a decision maker who is not both investigator and judge, arbitor and advocate. However, in both the determination of eligibility and "seated interview" stages, the department employee is both investigator and judge, since he is responsible both for collecting information and "checking" the recipient's allegations and for making the decision whether to terminate benefits. Moreover, the interviewing clerk responsible for terminating benefits may

have had a previous and long-hostile involvement with the claimant. However characterized, defendant's "seated interview" is essentially one between adversaries, albeit very unequal ones, pitting the interviewer against an often intimidated recipient. During the interview mutual hostility is commonplace. *See*, Harris, "Claimant's View of Unemployment Compensation Insurance in California", 4 *Unemp. Ins. Rev.* 2 (1967). The scope of the inquiry is entirely in the hands of the interviewer. The facts and issues are as he defines them. This indeed represents"... the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

As the appellant concedes, the department employee who conducts the "seated interview" is not required to rest his findings or decision solely on the facts and rules in evidence produced at the hearing; thus he may base the ruling on his background, his own background and knowledge or on information obtained outside the interview.

Lacking the procedural safeguards mandated in *Goldberg*, the accuracy of the appellant's "seated interview" terminations depends solely on the interviewing employee's inclination, ability and time to secure and judge relevant information, his application of very broad statutory standards such as "reasonable effort to seek work" to the multitude of facts which can influence this decision, and on the ability of recipients who are frequently of limited education and often experiencing language difficulties to marshall and articulate their cases on the spur of the moment to an

accusing department employee. The likelihood of error inherent in these circumstances is substantial.[77]

After summarily terminating recipients, the appellant does not even afford them a prompt post-termination evidentiary hearing. Moreover, even if this were true, this Court has held in *Wheeler v. Montgomery*, 397 U.S. 280 (1970) in rejecting the argument that because the recipient is afforded some of the elements of due process at a hearing prior to the termination of benefits, the recipient's due process rights can be satisfied completely in a hearing subsequent to the determination that he is eligible for benefits as in one held prior thereto, it held unconstitutional a pretermination "informal" conference which was substantially identical to the department's informal "seated interview" procedure at issue in this case. See also *Stanley v. Illinois*, 405 U.S. 645 (1972).

Thus the District Court was eminently correct when it ruled that the "seated interview" system denied claimants due process of law because:

> Claimants are provided with virtually no advance notice of the interview, or the precise issues involved and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact-finding examiner may go beyond the record of the "seated interview" in making his decision; when that

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[77]In discussing the unemployment examiner's counterpart in the welfare system this Court in *Goldberg* recognized the great possibility of honest error or irritable mis-judgment." *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970), quoting *Kelly v. Wyman*, 295 F.Supp. 893, 904-905 (S. D.N.Y. 1968) (Three Judge Court.)

decision made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification.

Steinberg v. Fusari, 364 F. Supp. 922, 035 (D. Conn. 1973)

V.

THE SUMMARY SUSPENSION OF UNEMPLOYMENT COMPENSATION BENEFITS FOR SEVERAL MONTHS PENDING A POST-TERMINATION EVIDENTIARY HEARING VIOLATES THE "WHEN DUE" AND "FAIR HEARING" REQUIREMENTS OF THE SOCIAL SECURITY ACT AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

This Court can decide this case without reaching the constitutional question of whether the Fourteenth Amendment requires an evidentiary hearing prior to the suspension of unemployment compensation benefits by addressing the statutory claim of the appellees, an issue the District Court felt unable to decide. The lower court (J.S.A. 13A, 22A, 23A) felt constrained by this Court's per curiam summary affirmance in *Torres v. New York State Department of Labor*, 405 U.S. 949 *rehearing denied*, 410 U.S. 971 from deciding the statutory issues presented herein. Indeed, the appellant (Brief of Appellant at 11, 15, 22) feels the *Torres* precedent controls the issues in this case. This Court has not accorded summary affirmances such weight.

This Court's recent decision in *Edelman v. Jordan*, ___ U.S. ___, 39 L.Ed.2d 662, 677, (1974) counsels us that "summary affirmances . . . . obviously are not of the same precedental value as would be an opinion of

this Court treating the question on the merits." Although Mr. Justice Rehnquist spoke in terms of the constitutional issue presented in that Eleventh Amendment decision, the appellant's reliance on *stare decisis* even for the statutory argument in *Torres* is incorrect because of this Court's statement in *Edelman*, supra 39 L.Ed.2d at 677 n. 14, that statutory issues never fully briefed or argued may also be reconsidered. *See also* Mr. Justice Powell's concurring opinion in *Mitchell v. W.T. Grant*, 40 L. Ed. 2d 406, 425 n. 2, (footnote omitted). In *Boys Market Inc. v. Retail Clerks Union*, 398 U.S. 235, 240 (1970), Mr. Justice Brennan noted for the court in interpreting The Norris-LaGuardia Act that:

> *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope intrinsically sounder and verified by experience *Helvering v. Hallock* 309 U.S. 106, 119 (1940) *Swift Co. v. Wickham* 387 U.S. 111, 116 (1965).

Since appellees maintain that the instant case turns on the proper interpretation of the Social Security Act, *Torres* does not foreclose a more searching analysis of that question. Rather *Torres* stands as a significant departure from this Court's view in *Java* that the Congressional policy on unemployment benefits is that it provides "early substitute compensation (to worker) during unemployment." 402 U.S. 121, 134. To understand the meaning of the Social Security Act, regarding unemployed workers both §§303(a)(1) and 303(a)(3) must be examined together. But in *Torres*,

the appellants never brought §303(a)(3) before this Court.[78]

Thus *Torres* "lacks the precedential controversy" (*Bob Jones University v. Simon*, ___ U.S. ___ 40 L.Ed.2d 496, 511 n. 11) since the issue of §303(a)(3) was never raised to this Court. Compare *California Department of Human Resources Development v. Java* 402 U.S. 121 (1971).

Indeed, by finding that such a hearing is required by statute would be in line with this Court's practice of scrutinizing Congressional intent and construing statutory requirements closely in order that delicate constitutional issues on procedural due process need not be reached. *See, Greene v. McElroy*, 360 U.S. 474, 507-08 (1959); *Wong Yang Sun v. McGrath*, 339 U.S. 33, 48-51 (1949), *Wright v. Richardson* 405 U.S. 208, 213 (Brennan J. Dissenting).

Section 303(a) of the Social Security Act, 42 U.S.C. Section 503(a), provides:

> The Secretary of Labor shall make no certification for payment (of federal funds for administration of state unemployment compensation statutes) to any state unless he finds that the law of such state, approved by the Secretary of Labor under the federal Unemployment Tax Act, includes provisions for –
>
> (1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . .
>
> (3) opportunity for a fair hearing before an impartial tribunal for all individuals whose claims for unemployment compensation are denied.

[78]Jurisdictional Statement in No. 71-5743, Page 3.

An examination of the statutory purposes of the Unemployment Compensation program, as revealed both in the legislative history and judicial interpretation of the Social Security Act, compels the conclusion that under the "when due" and "fair hearing" requirements, recipients must be provided with a full opportunity to be heard before the suspension of their benefits.[79]

In enacting the Unemployment Compensation program, Congress sought to achieve three principle purposes: (1) providing sustenance and security to unemployed workers without relegating them to public assistance; (2) helping unemployed workers to find employment substantially equivalent to their former jobs; and (3) maintaining the purchasing power of the unemployed, thereby stabilizing consumer demand and sustaining the economy. See generally, *California Department of Human Resources Development v. Java*, 402 U.S. 121, 130-133, (1971).

To achieve these purposes, Congress intended a hearing procedure that insures that payments are made

[79]It is clear that this court has power to review the issue of whether the department's procedures comply with the Social Security Act, regardless of administrative approval of those procedures by the Secretary of Labor. *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397, 420-23 (1970); *King v. Smith* 392 U.S. 309, 333 (1968). In Java, *supra*, the Secretary had not only approved the challenged procedure, but also submitted a brief *amicus curiae* arguing that it conforms to the provisions of the Act. This Court, citing *Rosado v. Wyman*, 397, 420-21 (1970), nonethless reviewed the issue independently and held that the California procedure violated the Act. Java, *supra*, 402 U.S. at 135. It rejected the argument advanced by California that the administrative approval of the procedure by the Secretary of Labor precluded judicial review. *See, California Department of Human Resources Development v. Java, supra*, Brief of Appellant at 10.

to workers at a time in their unemployment cycle, when such goals would be facilitated rather than frustrated. For this end to be accomplished, payments must not only commence promptly when a worker is unemployed, *See* Java, *supra,* they must also continue throughout the period of unemployment until such time as he is properly found to be no longer eligible for them. Only a "fair hearing" held before benefits are suspended can assure eligible unemployed workers full payment of unemployment compensation "when due." 42 U.S.C. §§503(a)(1) & (a)(3).

A. By Suspending Unemployment Benefits For Several Months Without A Prior Evidentiary Hearing On Continued Eligibility, The Department Defeats The Objective Of The Social Security Act And Violates The "When Due" Requirement.

1. By Causing Substantial And Unnecessary Delay Concerning Repayment Of Benefits To Eligible Recipients, The Department's Summary Suspension Procedure At The "Seated Interview" Fails To Insure The Full Payment Of Unemployment Compensation "When Due."

Section 303(a)(1) of the Social Security Act provides that State unemployment compensation programs must "be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. §503(a)(1). In *California Department of Human Resources Development v. Java,* 402 U.S. 121, (1971), this Court found that under this section of the Act, unemployment benefits become "due" after the initial eligibility determination – "the critical point in the [unemployment compensation] procedure." 402 U.S., at 127. Based upon this finding, the Court held

unlawful the summary suspension of an unemployed worker's benefits pending an employer's appeal. Since the summary suspension of benefits frustrated the congressional objective of providing "early substitute compensation during unemployment," the Court held that it violated the Social Security Act's "when due" requirement. 402 U.S., at 133.

The continued claim recipients in this case, like the recipients in *Java,* had been found initially eligible for benefits for a fixed number of weeks.[80] Yet they received no benefits pending an evidentiary hearing and decision on their continued eligibility. Indeed, the delay pending the hearing was so long that the great majority

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[80]The Department argument (Brief of Appellant at 14) that a claimant's eligibility is based upon a week to week recertification does not square with the practice of the Department, that it only conducts "periodic interviews" on continuing eligibility – Smarz Dep. A. 26a-27a, 29a-30a. Indeed the District Court in *Pregent v. New Hampshire Department of Employment Security* stated in 361 F.Supp. 784, 793, 794, (D.N.H., 1973) *vacated and remanded for determination of mootness* ___ U.S. ___, 42 U.S. L.W. 3651 (1974) ; that benefits are due "once both parties (claimant and employer) have notice and are permitted to present their respective positions" and that:

> Even though the defendant reviews on a weekly basis the eligibility of a claimant, we find that the concept of when benefits are 'due' under §§303(a)(1) of the Social Security Act, 42, §§503(a)(1), *does not change from week to week* after a claimant has been found *eligible* (emphasis added) and no due process hearing has been held with regard to a subsequent finding of ineligibility. Having been found initially eligible plaintiff was entitled to benefits until defendant afforded him a due process hearing. This requirement of a pretermination hearing is especially important because of the delay between the date that the eligibility determination is made and the date that the Appeal Tribunal's decision is rendered.

of eligible suspended recipients are already back at work by the time they received their benefits. In 1973, the average length of time an unemployed worker in Connecticut received unemployment benefits was approximately 9.3 weeks. *See,* Connecticut Labor Department Bulletins (Bi-monthly)–1973. Since 89.8 percent of all appeals took over 100 days to decide[81] and, "the figures indicate that 61.4 percent of all appeals took over 125 days to dispose of,"[82] the overwhelming proportion of unemployed workers whose benefits were wrongfully suspended eventually received them at a time when they no longer qualified for *current* payments. Thus, in the event a claimant's benefits are summarily suspended, an eligible[83] worker may receive no weekly benefits when in desperate need of this income,[84] only to receive a lump sum many months later when he is already at work. Administration of the Unemployment program in such a way negates the precise purposes compensation was intended to provide.[85]

The lower court in this case noted its agreement with another Three Judge Court in *Wheeler v. Vermont,* 335 F.Supp. 856 (D.Vt., 1971), (which struck down a similar unemployment "seated interview" system with a shorter delay period as violative of the Social Security

[81] *See,* J.S.A. at 17A.

[82] Almost 26% of the unemployed workers who appealed the suspension of their benefits are found to be eligible at the Commissioner's hearings. *See,* J.S.A. at 17A.

[83] *See,* Section I , of this brief, *infra.*

[84] J.S.A. at 21A n. 26.

[85] See page 101, *infra.*

Act;) but felt constrained by the *Torres* summary affirmance from following it.[86]

In *Wheeler* the Court stated:

> We thus face the question whether this procedure falls without the federal statutory mandate of §303 (a)(1) of the Social Security Act, 42 U.S.C. §503 (a)(1), that the State method of administration be reasonably calculated to insure full payment of unemployment compensation when due." *California Department of Human Resources v. Java. Cf. Rosado v. Wyman,* 397 U.S. 397, 420-21 (1970), affirmed after remand, 402 U.S. 991 (1971); *King v. Smith, supra,* at 317, 333. The evidence here shows that on the average, it takes approximately 37.5 days from a time a claimant appeals from a claim examiners' determination until the Appeal Referee's decision is rendered. This delay alone would be enough to warrant a finding that the procedure as we have above described it is not "reasonably calculated" to produce full payment "when due".
>
> 335 F. Supp. at 861.

[86] As Judge Smith, J.S.A. 13A, in the lower court decision noted:

> Were we writing on a somewhat cleaner slate, we would have little difficulty in rejecting the reasoning of the District Court in *Torres,* and concluding, largely for the reasons so aptly set out by Judge Oakes in *Wheeler v. The State of Vermont, supra,* that the Connecticut Unemployment Compensation procedures here challenged conflict with both the Fourteenth Amendment and the Social Security Act.

Appellant attempts to undercut the significance of the *Wheeler* decision (Brief of Appellant at 35) by asserting that the claims interview and termination procedures in Vermont differ from Connecticut because the claims examiner is not the decision maker. In fact, the "seated interview" claims examiner in Connecticut often has his eligibility decision checked by the office manager and approved by that supervisory personnel. (Smarz Deposition–A., 61a, 62a).

The Department does not dispute the fact that unemployment compensation is basically a short-term program to aid persons off work only for the period of time it takes them to find work (Brief of Appellant at 4)[87]. *See also*, Java, *supra*, 402 U.S. at 130-33. However, as shown above, the Department's own statistics reveal that the Connecticut scheme does not result in paying benefits during the "limited period" between jobs as Congress intended but rather results in payments several months after unemployment has ended. *See*, H.R. Rep. n. 615 74th Cong., 1st Sess. (hereinafter "H.R. Rep.") at 7 (1935); *Report to the President of the Committee on Economic Security Hearings on S. 1130 before the Senate Committee on Finance*, 74th Cong., 1st Sess. at 1321-22 (1935).[88]

Since the suspension of benefits pending an evidentiary hearing systematically denies early substitute "compensation during unemployment"[89] to eligible unemployed workers, it frustrates the fundamental objectives of the Social Security Act and, as the Courts in *Burney*, *Pregent*, and *Wheeler* found, is not "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. §503 (a)(1).

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[87]See Note, *infra* p. 108.

[88]As a California legislative study pointed out:

> It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not 4 or 5 weeks thereafter.

Report of the State Senate, Interim Committee on unemployment insurance to the 56th California legislature, 62 (1945).

[89]See, *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971).

2. The Departments' "Seated Interview" Suspension Procedure Frustrates The Congressional Purposes Of The Unemployment Compensation Program.

The summary suspension of benefits forces eligible recipients to rely on welfare or charity for sustaining funds. Connecticut does not participate in the AFDC-UP program for unemployed workers; (*See*, J.S.A. at 19A). It has a system of "town assistance" Conn. Gen. Stat. §17-277 et seq. which provides that an unemployed worker must be registered for work and available for work to receive welfare benefits. If a claimant is disqualified from receiving unemployment benefits for failure to make "a reasonable effort to find work." Conn. Gen. Stat. §31-235(1), (*See*, J.S.A. at 3 A), he is also similarly ineligible for town welfare. Conn. Gen. Stat. §17-273, 42 U.S.C. §§602(a)(19), 607(b)(1)(B).

As this Court has already determined, the chief purpose of the unemployment compensation program is to "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels with the necessity of his turning to welfare or private charity." Java, *supra*, 402 U.S. at 131-32. *See, generally*, H.R. Rep. at 7; S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935). Therefore this Court's assessment of the function of unemployment compensation as a social insurance system to keep unemployed workers off welfare rolls differs markedly from the Court's recent viewpoint on the financial harm a discharged federal employee may suffer in *Arnett v. Kennedy*, 40 L. Ed. 2d 15, 42 (concurring opinion of Mr. Justice Powell joined Mr. Justice Blackmun). Thoroughly familiar with the plight of workers "thrown out of work sudden-

ly,"[90] Congress sought to alleviate the pressing need for "security during the period following unemployment." S. Rep. No. 628, *supra*. However, because of the stigma attached to welfare, it was believed to be an inappropirate means of sustaining workers during temporary periods of unemployment. As was brought out on the House Floor by the Chairman of the Ways and Means Committee:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon their previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief. 79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton.)

Congress not only viewed welfare as imposing a stigma on unemployed workers, it doubted that welfare, with its reliance on general tax revenues which fluctuate with the state of the economy, could adequately provide large numbers of workers with the sustenance during a period of economic downturn. *See, Steward Machine Company v. Davis*, 301 U.S. 548, 586-87 (1937); Note, *Charity v. Social Insurance of Unemployment Compensation Laws*, 73 Yale L.J. 357, 359 (1963). In order to reduce the burden on local welfare rolls during periods of economic crisis and "very

[90]See *Hearing on H.R. 4120 before the House Comm. on Ways & Means*, 74th Cong., 1st Sess. 214 (1935) (statement of Harry L. Hopkins).

materially reduce the cost of relief in future years,[91] the employment security fund was designed to accumulate reserves in times of economic prosperity," *See*, H.R. Rep., at 7,[92] and that employers pay their fair share into the general fund.

In order for unemployment compensation to provide workers "security during the period following unemployment," Java, *supra*, 402 U.S. at 132, and thereby "to replace [relief] in large part," H.R. Rep., at 7, benefits payments must continue throughout the period in which the unemployed worker has been found eligible.[93] Interrupting the payment of benefits for

[91]S. Rep. No. 628, 74th Cong., 1st Sess. at 12. *See also, Java v. California Department of Human Resources Development*, 317 F.Supp. 875, 879 (N.D. Cal., 1970), aff'd 402 U.S. 121 (1971), in which the Court stated: "the most fundamental purpose in which both the federal and state unemployment compensation laws is to '*prevent* the burden of injured employees becoming charges upon society,' " (citations omitted.)

[92]Recent events have substantiated Congress' belief that state welfare systems cannot adequately deal with the economic dislocation caused by a severe period of unemployment. For example, in enacting emergency unemployment compensation benefits in 1971 to relieve the drain on unemployment funds, the Connecticut legislature recognized the need for additional benefits to help workers unemployed for long periods of time. *See* Conn. Gen. Stat. §231-232 (a) et seq. *See also*, Federal State Unemployment Compensation Act of 1970, P.L. 91-373, 84 Stat. 811, as amended by P.L. 92-329, Stat. 398 which provide extended unemployment benefits for those who exhaust the mandatory state allotment of unemployment insurance.

[93]The Connecticut Supreme Court in *Waterbury Saving Bank v. Danaher*, 128 Conn. 78, 82-83 (1940) recognized the importance that unemployment workers be paid benefits at once because:

> The act was adopted in consequence of the enactment of the federal social security acts . . . It was designed to ameliorate the tragic consequences of the enactment of unemployment . . . pursuant to the plan effective under

several months pending an evidentiary hearing forces a large number of unemployed workers to turn to relief or leaves them with no income whatsoever. Thus by suspending a recipient's benefits before the evidentiary hearing on his continued eligibility, the Department undermines the congressional purpose of "maintain[ing] the recipient at subsistence levels without the necessity of his turning to welfare or private charity," Java, supra, at 131-32, thereby increasing the burden on the already overburdened state and local taxpayer.

Appellant's contention that in making a claim for unemployment compensation, that each week the claimant must make an affirmative showing (Brief of Appellant at 14) as to eligibility is factually unsupported. As the record below (A. - 58a, 59a) indicates throughout, a claimant need only present his slip for benefits at the claims window, and his check will be presented to him provided the statement of availability for work has been signed on the back of the benefit slip. The Department's investigation of claimant eligibility at the claims window is sporadic and haphazard at best (A - 72a) and surely is not the thorough case-by-case review suggested by the Department (Brief of Appellant at 4 - 5).[94]

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it. . . . employees who lose their jobs may, after a waiting period be paid benefits limited in amount and duration, while looking for work but unable to find it. . . . that the purpose of the act is remedial is clear. It is therefore to be construed liberally as regards beneficiaries in order to accomplish its purpose.

See also, Reger v. Administrator, 137 Conn. 647, 650 (1946); *Mishaw v. Fairfield News,* 12 Conn. Supp. 318, 320 (1943).

[94] As of August, 1973, the Appellants have discontinued (A. - 129a) the use of their work search effort slip (U.C.-45 form) which was the form that caused discontinuance of the named plaintiff's, Miranda and Triana. This eligibility standard was removed once unemployment claims began to decrease in the Fall of 1973.

See U-I Statistics, January 1974, Table 16.

3. The Summary Suspension Of Benefits Renders Eligible Workers Less Able To Find Substantially Equivalent Employment.

Unemployment compensation was established by Congress "as a means of assisting a worker to find substantially equivalent employment." Java, *supra,* 402 U.S. at 132. In explaining to the House Ways and Means Committee why the draftsmen of the Social Security Act chose to include that unemployment compensation program, a member of the President's Committee on Economic Security pointed out:

> This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash.
>
> Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. 214 (1935) (statement by Harry L. Hopkins, Federal Emergency Relief Administrator).

If manpower is able to flow from pockets of unemployment to areas where jobs are available, employment becomes more stabilized and the supply and demand mechanism in the labor market operates more efficiently. However, the ability of a worker to find substantially equivalent employment is severely undercut when funds which may be used to purchase transportation for job interviews are terminated for several months during the period he is unemployed. The funds that might have been used to increase labor mobility may instead have to be spent on "basic necessities." *Cf. Goldberg v. Kelly,* 397 U.S. 254, 264

(1970). Thus, to the extent that the payments are delayed, the opportunity to find employment is diminished, which in turn often lengthens the period in which a recipient must rely on unemployment benefits for support. By suspending benefits pending an evidentiary hearing, only to pay them in a lump sum many months later, the Department is often responsible for a greater withdrawal from the employment security fund than if payments were made in their regular course during the initial stages of unemployment.

4. The Summary Suspension Of Benefits Reduces The Purchasing Power Of The Unemployed.

Both the national economy and the unemployed worker benefit when purchasing power is maintained throughout periods of high unemployment. Congress viewed unemployment compensation as "a measure intending to maintain purchasing power, upon which business and industry are dependent." H.R. Rep. at 7; *See generally*, Java, *supra*, 402 U.S. at 132-33. During the period in which they receive no compensation, unemployed workers are to a great extent inhibited from spending money on consumer goods. Declining consumption leads to a decrease in production by business firms which in turn causes further unemployment and eventually, economic depression. On the other hand, maintenance of purchasing power, through a steady flow of unemployment benefits commencing soon after unemployment occurs, contributes to the stability of the overall economic situation. As Senator Wagner, sponsor of the Social Security Act, pointed out to the Senate Committee on Finance:

> The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the security of prosperity.
>
> *Hearing on S. 1130 before the Sen. Comm. on Finance*, 74th Cong., 1st Sess. 2 (1935).[95]

Thirty-five years later, in reporting the FEDERAL - STATE EXTENDED UNEMPLOYMENT COMPENSATION ACT OF 1970 (P.L. 91-373), the Senate Committee on Finance reiterated the vital role of Unemployment benefits in maintaining economic stability:

> In periods of economic recession, when substantial numbers of workers in a state or in the nation experienced unemployment which extends beyond the periods for which they are protected under current state laws, the resulting uncompensated unemployment may have a serious impact not only upon the workers and their own families but on the purchasing power and on the economic health of the entire nation.

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[95]Similarly, Frances Perkins, Secretary of Labor and Chairman of the President's Committee on Economic Security which drafted the Social Security Act, testified:

> We have also by observation of the condition of other countries having a modest scheme of unemployment insurance come to a recognition of the small merchants of a locality and those who provide them with their stock, have derived a benefit because persons out of work continued to buy the necessities of life and therefore helped to make a market for the whole community. That, of course, in its own turn, has a very definite and advantageous effect on unemployment in other lines than on that first depressed.
>
> *Hearings on S. 1130 before the Sen. Comm. on Finance*, 74th Cong., 1st Sess, 111 (1935).

S. Rep. No. 91-752, 91st Cong., 2nd Sess. (1970), *U.S. Code Cong. and Admin. News, at 3635.*

For the maintenance of purchasing power to be achieved, it is necessary that unemployment benefits be paid throughout the critical period of unemployment, not in lump sum form long after unemployment has ceased as is frequently the result under the Department's summary suspension procedure. Payments must *regularly* be made, "early in the downturn, immediately after unemployment makes its appearance." *See,* Clague, *The Economics of Unemployment Compensation,* 55 Yale L.J. 53, 69 (1945).

Uninterrupted payments enable workers and their families:

> . . . to preserve existing assets, such as homes, furniture and automobiles, thus avoiding the forced liquidation of assets which aggravated the down-turn in business. They encourage more confident spending of resources, thus helping to avoid a "freezing" of purchasing power on the part of millions of worker when they are faced with unemployment.
>
> Clague, *supra,* 55 Yale L.J. at 69.[96]

Whereas lump sum payments may be spent erratically, a steady weekly income assures that "these funds are ordinarily spent for the basic necessities of life and furnish purchasing power for the products of our basic industries such as agriculture, food and clothing." *Id.* By interrupting the steady stream of payment benefits to

[96]Unemployment compensation is "specially earmarked for the use of the unemployed at the very times when it is best for business that (it) should be so used."

Statement of Senator Robert F. Wagner, *Hearings on S. 1130 before the Sen. Comm. on Finance,* 74th Cong., 1st Sess., 2 (1935).

unemployed workers for several months pending an evidentiary hearing, the department's summary suspension procedure thus frustrates the Social Security Act's objectives of stabilizing the economy by maintaining the purchasing power of the unemployed. *Cf.* Java, *supra,* 402 U.S. at 132-133.

5. The Continued Claim Recipient Is Entitled To Protection Of The "When Due" Clause.

In disregarding the fact that the summary suspension of benefits for several months directly contravenes the purposes of the "Social Security Act," the Department attempts to justify the interruption of benefit payments arguing that each week constitutes a "new eligibility determination and that benefits are therefore only 'due' for a one week period." (Brief of Appellant at 8, 14). Both the Department's terminology and its practices belie this contention. After the initial eligibility investigation *see,* Java, *supra,* 402 U.S. at 125-38, the worker who has been found initially eligible is placed by the Department in a "continued claims category." *See,* Department Form U.C.-45, A-122a. He has established his benefit rights as an "insured worker." Conn. Gen. Stat. §§31-236 and 31-241; and any disputes concerning the reasons for the termination of his last employment or the extent of his prior earnings have been resolved in his favor. Conn. Gen. Stat. §31-274(c). *See,* Java, *supra,* 402 U.S. at 125-29. He has been found eligible to receive a set amount of benefits for a fixed number of weeks. *See,* Conn. Gen. Stat. §31-241. In short, following an initial determination of eligibility, the unemployed worker occupies a new position, entirely different from a worker whose

entitlement to benefits has never been established. Indeed, as the deposition of a veteran unemployment department employee indicates, the claimant in a "continued claim status" is not checked when he receives his payments every week, but rather it is done on a very random basis determined by the press of claims presented and the availability of workers to interview the claimant. (A. - 94a-96a).[97]

Therefore, although it is necessary for the recipient to "report to the local office to continue his claim," no new initial redetermination of eligibility occurs. The recipient merely goes to the unemployment office each week, signs a benefit voucher and then is given his check. Personal interviews occur not every week, nor bi-weekly, but only at random intervals depending on the availability of a line examiner on the issue of continued eligibility.[98]

If his continued eligibility is challenged by the department, it is unlikely that benefits will be withheld only for a particular week. Rather, depending upon the Department's purported justification for the suspension or termination, his benefits may be discontinued for what the department terms a "penalty period" of

[97]The Department has recently abolished (April 4, 1974) its random redetermination of eligibility for claimants in the "continued claim" status, so that periodic reinterviews of claimants in "continued claims" status is no longer mandatory. In pertinent part, this memorandum to all office managers states: "Effective immediately the *periodic reinterviews* conducted by the Unemployment Compensation Department are to be discontinued . . . All claimants are to be interviewed by the Employment Service at least once a month to expose claimants to Job Bank Listings . . ."

[98]See, Smarz's deposition, (A. - 57a, 58a, 59a and A. - 131a).

several weeks. Conn. Gen. Stat. §31-236.[99] The Department in fact employs a standard of presumptive ineligibility for those claimants who are found not available for work, (A. - 41a Affidavit of Juan Miranda).

In appellee Miranda's case, for example, the erroneous termination of benefits was for an indefinite period. In appellee Paskewitz's case, the termination of benefits was also for an indefinite period. In appellee Triana's case, the termination was for a period of five weeks with the added unjustified penalty that all benefits to be paid would be held pending the determination by the commissioner on her appeal.[100]

Although the court below felt constrained from ruling on the statutory claim presented herein, appellees maintain that, benefits are not "due each week, but rather are continuously 'due' continued claims "recipients throughout their fixed period of eligibility unless they have been found on the basis of a full evidentiary hearing to have violated full department regulations and memoranda." Indeed, the district court in *Burney* so found when it stated:

> . . . the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due

[99]Various subsections of Conn. Gen. Stat. §31-236 outline varying periods of disqualification which continue for periods more than the one week new determination, that the Department purports to be the standard of use in determining eligibility in Connecticut.

[100] See statement and admission of Department that this practice violates Department policy, yet is found to be in effect in many of the larger unemployment offices throughout the State of Connecticut. (A. 39a, Stipulation No. 15).

> process hearing has been held with regard to a subsequent finding of eligibility . . . .
>
> The court thus finds that the Plaintiff Burney's benefits were "due" and could not be summarily suspended due to the deputy's determination of ineligibility under Section 2-1542a(d). Having been found eligible pursuant to the [initial eligibility determination procedure], Plaintiff Burney was entitled to benefits until defendant afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under Section 303(a)(1) of the Social Security Act. [*See*, Java, *supra*, 402 U.S. at 133-35, Burney, *supra*, 347 F.Supp. 218, 223 (N.D. Ind., 1971)].

To accomplish the objectives of the Social Security Act, Congress intended that continued claim recipients, no less than the initial recipients before the Court in *Java*, be afforded timely payment of unemployment compensation. Only an evidentiary hearing prior to a proposed termination of benefits can achieve this goal, and insure eligible recipients, "full payment of unemployment compensation when due." 42 U.S.C. Section 503 (a)(1). The seated interview presently utilized by the Department does not provide for "payment when due" but constitutes a sham and a direct affront to the laudible purpose and congressional intent of the Social Security Act of 1935.

B. By Delaying An Evidentiary Hearing Until Several Months After The Suspension Of Benefits, The Department Violates The "Fair Hearing" Requirement Of The Social Security Act.

The Social Security Act requires that the Department afford a "fair hearing" to unemployment compensation

recipients whose benefits are suspended. 42 U.S.C. Section 503 (a)(3). This statutory "fair hearing" must comport with due process requirements. As this Court stated in *Shields v. Utah-Idaho Central Railway Co.*, 305 U.S. 177, 182 (1938), the "manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of the administrative body are entitled to insist."[101]

It is uncontested that the "fair hearing" required by the Social Security Act must be a full evidentiary hearing.[102] It must also be a prior hearing. In interpreting other statutory "fair hearing" requirements, this Court has recognized that in many instances a statute only satisfies due process if the hearing is provided prior to the deprivation of property. In *United States v. Illinois Central Railroad Co.*, 291 U.S. 457

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[101] *See also, Philadelphia Co. v. Securities and Exchange Commission*, 175 F.2d, 808, 817 (D.C. Cir., 1948), *vacated as moot*, 337 U.S. 901 (1949).

[102] In describing the elements that should be included in an unemployment compensation "fair hearing," the United States Department of Labor has specified the same procedural protections outlined by this Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970):

> Hearings must be fair and they must therefore be conducted in accordance with the procedural safeguards. The essential requisites of fairness, although expressed in many ways, include the following elements which have been exerpted from case law: "Timely notice to all claimants of every material step in the proceeding; . . . to hear the evidence against him and to know the claims of his opponent; . . . to cross examine witnesses; . . . and the decision of the board shall be governed and based upon the evidence produced at the hearing . . ."
>
> U.S. Department of Labor, Unemployment Insurance Services, Office of State Operations, Guide to Unemployment Insurance Benefits Appeals: Rules and Procedures, 2-3 (1970).

(1934), for example, an administrative rate making procedure for railway freight charges lacking a prior hearing was challenged on both statutory and constitutional grounds. The court found that a prior hearing was required under the statute's fair hearing provision.[103] Having so ruled, the court concluded that the statute satisfied due process requirements. Likewise, for the unemployment compensation statutory scheme to meet constitutional standards,[104] the "fair hearing" required by the Social Security Act must be a prior hearing and it must be prompt.

Further, to assure fulfillment of the statutory purposes of the unemployment compensation program, only a hearing held before benefits are suspended meets the Act's "fair hearing" requirement. Only a prior hearing assures the regular flow of benefits to eligible workers – which "is what the unemployment insurance program was all about." Java, *supra*, 402 U.S. at 135. Any other procedure denies benefits during the critical period in which the Department recognizes unemployment compensation must be paid.

The Department urged in the District Court that the post termination commissioner's hearing fulfills its due process and fair hearing obligation under the Act, (Brief of Appellant at 19-20, in District Court). On appeal, however, they have wisely abandoned that position. By delaying this evidentiary hearing until several months after the suspension of a continued claim recipient's benefits, the Department fails to provide a "fair hearing" at a meaningful stage in the unemployment compensation cycle. Large numbers of eligible recipients

[103] See also, Greene v. McElroy, 360 U.S. 474 (1959)

[104] See, Section II of this brief, *infra*

are thereby deprived of an "early substitute compensation during unemployment." Java, *supra*, 402 U.S. at 133. The Department's failure to provide a pre-termination evidentiary hearing directly contravenes the congressional purposes of (1) providing sustenance and security to unemployed workers without relegating them to welfare, (2) helping workers in their search for new employment, and (3) maintaining the purchasing power of the unemployed throughout the continuous payment of benefits, and thus violates the Social Security Act's "fair hearing" requirement. 42 U.S.C. Section 503(a)(3).

CONCLUSION

For the reasons that Connecticut's "seated interview" system for terminating or suspending unemployment compensation benefits violates the Due Process Clause of the Fourteenth Amendment and the "when due"

and "fair hearing" requirements of the Social Security Act, the judgment below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

JACK A. FUSARI, COMMISSIONER OF LABOR, *et al.*,
Appellants,

v.

LARRY STEINBERG, *et al.*,
Appellees.

On Appeal From The United States District Court For The District Of Connecticut

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MOTION BY ELLENMAE CROW, THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Ellenmae Crow, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the United Steelworkers of America, AFL-CIO, hereby respectfully move for leave to file a brief *amici curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. This motion is occasioned by the movents inability to secure the consent of both parties.

INTEREST OF THE AMICI CURIAE

Ellenmae Crow, the AFL-CIO, and the United Steelworkers are parties to the proceeding entitled *Crow, et al.* v. *California Department of Human Resources Development,*

No. 73-1015, presently pending on a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Very briefly stated the facts and the procedural history of *Crow* are as follows. Ellenmae Crow was found initially eligible for unemployment compensation benefits by the State of California. She received regular benefit payments for four months when California terminated her compensation for ten weeks for allegedly refusing an offer of employment. (Cal. Unemp. Ins. Code §§ 1257(b), 1260(b).)

The California procedure under which Mrs. Crow's benefits were terminated does not provide the recipient such pre-termination procedural safeguards as prior written notice, a meaningful opportunity to obtain representation and gather evidence, an opportunity to confront and cross-examine witnesses, or a decision by an impartial decision-maker based solely upon evidence adduced at a hearing. It provides only an opportunity to discuss the termination at a "pre-appeal interview." The first proceeding containing the aforementioned procedural safeguards is a "referee hearing,"[1] occurring several weeks or months after the termination of benefits.

Mrs. Crow protested the termination of her benefits and requested a referee hearing. Prior to her hearing before the referee, Mrs. Crow, facing a financial emergency due to the loss of her benefits, commenced a class action[2] con-

[1] *See* Cal. Unemp. Ins. Code §§ 1951-1959, 22 Cal. Admin. Code §§ 5029-5030, 5038.

[2] Named as defendants were the California Department of Human Resources Development, the Department's Director, the Supervisor of the Department's Santa Cruz, California office, and the Secretary and the Regional Director of the United States Department of Labor. The District Court dismissed the latter three defendants

testing the legality of these summary termination proceedings. Subsequently the referee found that Mrs. Crow had not refused an offer of employment, and reversed the termination of her benefits.[3]

The District Court ruled that where an unemployment compensation recipient, who has properly been found initially eligible for benefits, contests an administrative determination that he or she is no longer eligible, the recipient is entitled to "a hearing consonant with the principles of Goldberg v. Kelly [397 U.S. 254]." (*Crow* v. *California Department of Human Resources Development*, 325 F.Supp. 1314 (N.D. Cal.).) A divided Court of Appeals reversed, (Battin, D. J., & Trask, C. J., formed the majority; Duniway, C. J., dissented). (*Crow* v. *California Department of Human Resources*, 490 F.2d 580 (C.A.9).)[4]

Thus, *Crow* and the instant case[5] are parallel proceedings

from the action, and granted the United States of America leave to intervene.

The suit, filed under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, challenged the denial of an evidentiary pre-termination hearing as violating the "when due" and "fair hearing" requirements of the Social Security Act, 42 U.S.C. §§ 503(a)(1) & (a)(3), and the due process clause of the Fourteenth Amendment.

[3] In lieu of granting a temporary restraining order restoring Mrs. Crow's benefits pending a hearing, the District Court accepted California's offer to expedite her hearing and decision.

[4] The proceedings in the Ninth Circuit were twice stayed, first pending the decision by this Court in *California Human Resources Dept.* v. *Java*, 402 U.S. 121, and subsequently pending this Court's decision in *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540. During those proceedings the Court of Appeals granted leave to the American Federation of Labor and Congress of Industrial Organizations and the United Steelworkers of America, AFL-CIO, to intervene.

[5] The facts and the procedural history of the instant case are set out in *Steinburg* v. *Fusari*, 364 F.Supp. 922, 924-927 (D. Conn.).

concerning the identical aspect of the "federal-state cooperative unemployment insurance programs" (*California Human Resources Dept.* v. *Java*, 402 U.S. 121, 125); the former arising in the context provided by the Social Security Act and the implementing laws of California, the latter in that provided by the Act and the implementing laws of Connecticut. The primary interest of Mrs. Crow, the AFL-CIO, and the Steelworkers in the instant case is, therefore, to preserve their position as litigants in the *Crow* case.

The Federation and the Steelworkers have a more general interest as well. The AFL-CIO is a federation of 111 national and international unions having a total membership of approximately 13,500,000 working men and women. The Steelworkers is an international union with a membership of approximately 1,250,000 workers. Unemployment compensation was designed to protect "workers ordinarily steadily employed." (*Java*, 402 U.S. at 131.) That, of course, is an accurate description of the great majority of trade union members. The instant case will, therefore, have a substantial impact on the manner in which unemployment compensation is administered throughout the country. That is why the AFL-CIO and the Steelworkers are vitally concerned as to its outcome (and why they intervened in *Crow*). But in this instance the practical importance of the question does not exhaust organized labor's interest in the proceeding. For, summary suspension of unemployment benefits is not based on a valid neutral principle—it is based on the principal that the entire costs of litigation delay incident to the resolution of a disputed question of continued eligibility for benefits shall be borne by the unemployed. Thus, it discriminates against workers, as a class, thereby distorting the basic protective purposes of the unemployment compensation program.

THE ISSUE TO BE COVERED IN THE BRIEF AMICI CURIAE

In their Motion to Affirm the Appellees placed their reliance on the Due Process Clause. In contrast, it is our view that this case turns on the proper interpretation of the Social Security Act, and that the cases delineating the content of due process are principally relevant insofar as they inform the construction of §§ 303(a)(1) & (a)(3) of the Act, which require the States to adopt procedures which "insure full payment" of benefits "when due," and to provide "fair hearings" to unemployment compensation recipients. The argument developed in the accompanying brief reflects this orientation.

Moreover, as already noted, the instant case does not concern Connecticut alone, it treats with the rules to be observed throughout our "federal-state cooperative unemployment insurance program," (*Java*, 402 U.S. at 125). In recognition of this, the Appellants' brief is filed on behalf of the States of Connecticut, California, New Hampshire, and Maine. The accompanying brief, in order to supplement the facts as to the Connecticut unemployment compensation program, therefore discusses in some depth the present procedures utilized in the California program (in which the *Crow* case arose).

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion to file the accompanying brief *amici curiae* in the instant case.

Respectfully submitted,

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July, 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

JACK A. FUSARI, COMMISSIONER OF LABOR, *et al.*,
Appellants,

v.

LARRY STEINBERG, *et al.*,
Appellees.

On Appeal From The United States District Court For The District Of Connecticut

BRIEF FOR ELLENMAE CROW, THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, AS AMICI CURIAE

This brief *amici curiae* is filed by Ellenmae Crow, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the United Steelworkers of America, AFL-CIO, contingent upon the Court's granting the foregoing motion for leave to file a brief as *amici curiae.*

The interest of Mrs. Crow, the AFL-CIO, and the Steelworkers is set out on pp. i-iv of the foregoing motion for leave to file a brief as *amici curiae.*

SUMMARY OF ARGUMENT

1. *Introduction.* This case raises the question of whether a State may, consistent with §§ 303(a)(1) & (a)(3) of the

Social Security Act, or the Due Process Clause, cut off the benefits of unemployed workers who have properly been found initially eligible for unemployment compensation without an "evidentiary pre-termination hearing" (*Wheeler* v. *Montgomery*, 397 U.S. at 280, 282)—*viz*, a hearing providing the recipient a meaningful opportunity to obtain representation and gather evidence, an opportunity to appear personally, offer evidence, confront and cross-examine witnesses, and a decision by an impartial decision-maker based solely upon evidence adduced at a hearing. (See, *Goldberg* v. *Kelly*, 397 U.S. 254, 267-271.) The States' efforts to pretermit reasoned discussion of that question will not withstand scrutiny.

(a) The lynchpin of the States' position is that this Court's *per curiam* summary affirmance in *Torres* v. *New York State Department of Labor*, 405 U.S. 949, rehearing denied 410 U.S. 971, is a dispositive precedent. (Br. of Appellants, 11, 15, 22.) But, Mr. Justice Rehnquist reminded just this term that "summary affirmances • • • obviously are not of the same precedential value as would be an opinion of this court treating the question on the merits." (*Edelman* v. *Jordan*, ___ U.S. ___, 42 U.S.L.W. 4419, 4425 (Mar. 25, 1974).) Moreover, to ascertain the answer to the question presented provided by the Social Security Act it is necessary to consider both §§ 303(a)(1) & (a)(3) of that Act. In *Torres*, however, the appellants never even brought § 303(a)(3) before this Court. Thus, *Torres* "lacks the precedental weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon*, ___ U.S. ___, 42 U.S.L.W. 4721, 4725 n. 11 (May 15, 1974)), through which the Court has been advised of all the legally relevant issues.

(b) The States also argue that unlike the welfare recipients before the Court in *Goldberg* v. *Kelly*, 397 U.S. 254, unemployment compensation recipients who have properly been found initially eligible have no "continuing right to benefits," and thus a cessation of their benefits cannot be characterized as a "termination" or a "suspension." (Br. of Appellants, 14.) The terminology and procedures of the "federal-state cooperative unemployment insurance programs" (*California Human Resources Dept.* v. *Java*, 402 U.S. 121, 125), belie this contention.

For example, in California (the State in which *Crow et al* v. *California Human Resources Dept., et al*, No. 73-1015, arose (see Motion pp. i-iv)), after the initial eligibility determination an eligible unemployed worker is considered by the State to be in a "continued claim" status. (22 Cal. Admin. Code § 1326-4(b).) He has established a "valid claim" for benefits and consequently has been found eligible to receive a fixed benefit amount for a definite number of weeks. (Cal. Unemp. Ins. Code §§ 1276, 1280, 1281.) Thus, California recognizes that the eligible unemployed worker occupies a position entirely different from the applicant whose entitlement to benefits has never been established. Moreover, while the States argue that each week is a discrete eligibility period, a recipient's benefits can be discontinued not only for one week, but for 10 weeks, 18 weeks, or even indefinitely, depending on the purported justification for the cut-off. (See Calif. Unemp. Ins. Code §§ 1260, 1261; 22 Cal. Admin. Code § 1253(c)-2.) Finally, a point by point comparison between the welfare and unemployment compensation systems shows that both programs require the recipient to make a periodic report concerning his continued eligibility. And, just as the unemployment compensation

recipient must verify that he was "available for work," that he "conducted a search for suitable work" and that he did not refuse "suitable work," (Cal. Unemp. Ins. Code § 1253(c) & (e), 1257(b)), so, too, the AFDC welfare recipient must satisfy these same requirements (see generally 42 U.S.C. §§ 602(a)(19), 607(b)(1)(B); Cal. Welfare and Institutions Code §§ 11300, 11201).

The short of the matter is that in both the unemployment compensation and welfare systems, as a condition precedent to receiving benefits, a claimant must undergo an initial eligibility investigation and thereafter his continued payments are subject only to certain conditions subsequent.

2(a) *The Social Security Act.* The appropriate point of departure for consideration of the proper construction of the Social Security Act is the Chief Justice's succinct description of Congress' overriding goal in enacting a system of unemployment compensation:

> "[T]he Congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible • • • is what the Unemployment Insurance program was all about." (*California Human Resources Dept.* v. *Java*, 402 U.S. 121, 135.)

Only prompt and continuous payment of unemployment compensation to eligible recipients "accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demand; delaying compensation until months have elapsed defeats these purposes." (*Id.* at 133.) And only if the hearing required by § 303(a)(3) (which must include such procedural safeguards as notice, an opportunity to obtain representation, confrontation and cross-

examination of witnesses, and a decision based solely on the record at the hearing) is provided prior to a cut off is the prompt and continuous payment of benefits to those eligible to receive them assured. So long as unemployment compensation may be cut off without such a hearing, the system does not "insure full payment" of benefits "when due," as required by § 303(a)(1). For, the present administrative procedures deprive a substantial number of *eligible* recipients of their benefits during the period Congress intended them to be paid.

The national averages reflecting the performance of the "federal-state cooperative unemployment insurance programs" (*Java*, 402 U.S. at 125), over the past five years show that 28.1% of all appealed decisions terminating benefits are reversed after an evidentiary hearing, and that 47.6% of the hearing decisions are rendered more than 45 days after the cut off. In *Java*, this Court concluded that the California procedure challenged there, "which suspen[ded] payments for a median period of seven weeks" violated the Social Security Act since it "fail[ed] to meet the objective of early substitute compensation during unemployment." (*Id.* at 133.) The foregoing statistics demonstrate that the procedure challenged here is equally at odds with that prime Congressional objective.

(b) In *Goldberg* v. *Kelly* the Court noted the "particularly telling" significance of the "welfare bureaucracy's difficulties in reaching correct decisions on eligibility." (397 U.S. at 264 n. 12.) The reversal rate just cited demonstrates that the unemployment compensation bureaucracy has the same difficulty. In both instances that difficulty is the direct result of the fact that the cases being decided are those "where recipients have challenged proposed termina-

tions as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." (Cf. 397 U.S. at 268.) The issues most frequently arising in unemployment compensation cases are, in the words of the District Court in *Crow* (325 F. Supp. at 1316), "preeminently factual," and they turn on a "broad fault standard [which] is inherently subject to factual determination and adversarial input." (*Mitchell* v. *W. T. Grant*, ___ U.S. ___, 42 U.S.L.W. 4671, 4677 (May 14, 1974).) Thus, the complexity of the issues and the nature of the relevant evidence make an evidentiary pre-termination hearing necessary to prevent the wrongful deprivation of unemployment compensation.

(c) Congress insisted on early substitute compensation because in its absence a worker "ordinarily steadily employed," whom the unemployed compensation program was designed to protect "would otherwise have nothing to spend." (*Java*, 402 U.S. at 131.) While the unemployment compensation system is financed under insurance principles, "the insurance technique is a means to the welfare end." (Becker, The Inadequacy Of Benefits In Unemployment Insurance, In Aid Of The Unemployed, 80 (1965).) For the typical wage earner who utilizes the unemployment compensation system, it is true today, as it was in 1935, "that there exist[s] a need which [the] individual [is] incapable of meeting [himself]." (Cf. Becker, *supra* at 81.) The average unemployment compensation recipient has sufficient assets to tide him over only three and one half weeks of uncompensated unemployment. Since the procedures for establishing initial eligibility require approximately three weeks to run their course after the loss of employment (*Java*, 402 U.S. at 126), that worker's resources

will be exhausted by the time payments begin. If his unemployment benefits are cut off, he and his family are left destitute.

It is no answer to say that such worker may secure welfare. The chief purpose of the unemployment compensation program was to:

> "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels *without the necessity of his turning to welfare or private charity.*" (*Java*, 402 U.S. at 131-132, emphasis added.)

Further, the categorical welfare programs are simply unavailable to the unemployed worker deprived of unemployment compensation. Individuals who have allegedly refused work, or are allegedly unavailable for work, the very reasons for most unemployment compensation cut offs, are automatically ineligible for categorical aid programs. (See 42 U.S.C. §§ 602(a)(19), 607(b)(1)(B).)

(d) Providing evidentiary pre-termination hearings is "administratively feasible." (Cf., *Java*, 402 U.S. at 125.)

Two preliminary points should be clarified at the outset. For those recipients who accept the state's decision to cut off benefits, nothing more than the present administrative interview is required. An evidentiary pre-termination hearing need be afforded only those who wish to contest the cut off decision. Second, this case is not like *Arnett* v. *Kennedy*, ___ U.S. ___, 42 U.S.L.W. 4513 (April 16, 1974), where the requirement of an evidentiary pre-termination hearing would have repercussions on substantial nonfinancial government interests. For the States already provide

evidentiary hearings. Thus, the issue here is simply whether a recipient who challenges his cut off is to continue to receive benefits pending that hearing. The state's interest is therefore totally financial, and it is *de minimis*.

The present procedures are wholly unnecessary to safeguard the solvency of the unemployment compensation fund. In California, for example, the data available for the last full year of operations, 1973, indicate that the estimated loss resulting from payments pending a hearing would be approximately .16% of the California Fund's reserves.

The States' attempt to invoke the interests of the "private employers who fund the program" (Br. of Appellants, 24), to support their position. But this identical argument in support of cut offs without a prior hearing was raised and rejected in *Java*. (402 U.S. at 135.) As Mr. Justice Douglas explained (402 U.S. at 135 (concurring opinion).):

> "an employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is not charged with any benefits paid to his former employee pending his appeal. He has no responsibility for recoupment."

Any unrecouped overpayments resulting from the payment of benefits pending evidentiary hearings for recipients eventually found to be ineligible are charged against the overall fund. And, the employers' financial interest in that fund is identical to that of any other group of taxpayers composed of less than the general public, such as homeowners paying property taxes or automobile owners

paying automobile registration taxes. (See *Labor Board* v. *Gullet Gin Co.*, 340 U.S. 361, 364.) Further, in light of the figures indicating the minimal cost to the fund of evidentiary pre-termination hearings the possibility of any financial impact on employers as a group is unlikely in the extreme.

(c) In sum, there can be no doubt that if the Congressional purposes embodied in the Social Security Act are to be accomplished, §§ 303(a)(1) & (a)(3) can only be read as requiring evidentiary pre-termination hearings.

3. *The Due Process Clause.* The foregoing argument as to the proper construction of the Social Security Act is, we submit, despositive. But, in addition, it is well settled that in determining the content of procedural regulations such as §§ 303(a)(1) and 303(a)(3) of the Act, the courts look to the context provided by the decisions elaborating the elementary notions of fair procedure contained in the Due Process Clause, as well as to the language, purpose and legislative history of the statutes in question. (*Greene* v. *McElroy*, 360 U.S. 474, 507-508; see also, *Arnett* v. *Kennedy*, —— U.S. ——, 42 U.S.L.W. 4513, 4540 (White, J., concurring and dissenting).)

(a) From what has been demonstrated thus far it is apparent that like welfare recipients, unemployment compensation recipients who have properly been found to be initially eligible have a "legitimate claim of entitlement." The constitutional requirement of due process is therefore applicable. (See *Arnett*, 42 U.S.LW. at 4541 (White, J., concurring and dissenting), 4547 (Powell, J., concurring).)

(b) *Goldberg* v. *Kelly*, 397 U.S. 254, holds that an evidentiary pre-termination hearing is the pre-condition for

the cut off of welfare. Under the *Goldberg* analysis "the crucial factor" is whether the loss of an entitlement "may deprive" an eligible recipient "of the very means by which to live while he waits." (See *Arnett*, 42 U.SL.W. at 4541 (White, J., concurring and dissenting).) The reason for the distinction between welfare recipients and "the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption," as stated in *Goldberg*, is that for qualified recipients, "welfare provides the means to obtain essential food, clothing, housing and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239." (397 U.S. at 264.) In the cited portion of *Nash* a unanimous Court had emphasized that the improper termination of unemployment benefits would cause an unemployed worker to "risk financial ruin." (389 U.S. at 239.) Thus, in *Goldberg* the Court equated the situation of welfare, and unemployment compensation, recipients. And, the foregoing demonstrates that no line of demarcation between the two can be drawn.

The short of the matter is that unemployment compensation presents perhaps a more compelling case for evidentiary pre-termination hearings than welfare. The factual issues are more complex, and the governmental interest in summary adjudication is far less since substantial recoupment of overpayment is available. Like welfare, unemployment benefits are vitally needed, often providing the sole means of subsistence, but unlike welfare, unemployment compensation is a "contractual right" upon which Congress intended workers to be able to rely should they become involuntarily unemployed. (*Java*, 402 U.S. at 131.)

It follows that the procedural safeguards enumerated in *Goldberg* are applicable here. The opposite conclusion

would create the intolerable paradox that the unemployment compensation recipient's *earned* right to benefits would be less carefully safeguarded from arbitrary termination than the welfare recipient's right to benefits. That result would make a hollow mockery of Congress' intent to provide the worker "ordinarily steadily employed" with "security during the period following unemployment." (*Java*, 402 U.S. at 131, 132.)

ARGUMENT

1. *Introduction.* This case raises the question of whether a State may, consistent with §§ 303(a)(1) & (a)(3) of the Social Security Act, or the Due Process Clause, cut off the benefits of unemployed workers who have properly been found initially eligible for unemployment compensation without an "evidentiary pre-termination hearing," (*Wheeler* v. *Montgomery*, 397 U.S. at 280, 282)—*viz*, a hearing providing the recipient a meaningful opportunity to obtain representation and gather evidence, an opportunity to appear personally, offer evidence, confront and cross-examine witnesses, and a decision by an impartial decision-maker based solely upon evidence adduced at a hearing. (See, *Goldberg* v. *Kelly*, 397 U.S. 254, 267-271.)

In order to avoid analysis of that problem the States[1] attempt to sweep all the chessmen off the table. At the threshold they argue that the foregoing question presented is answered by prior precedent, and alternatively, that there is no such question, since in the unemployment compensa-

[1] The Brief for the Appellants is not filed solely by the State of Connecticut (in which the instant case arose), but by Connecticut, California, New Hampshire, and Maine. It is for that reason that we refer to the "States."

tion system (as contrasted to the welfare system considered in *Goldberg* v. *Kelly, supra*) no "continuing right to benefits" is established by a ruling of initial eligibility, and hence every ruling adverse to a recipient is in effect an initial determination of ineligibility, and not a "termination" or "suspension" of benefits. Neither of these efforts to pretermit reasoned discussion will withstand scrutiny.

(a) The lynchpin of the States' position is that this Court's *per curiam* summary affirmance in *Torres* v. *New York State Department of Labor*, 405 U.S. 949, rehearing denied 410 U.S. 971, is a dispositive precedent. (Br. of Appellants, 11, 15, 22.) But this Court has not accorded summary affirmances such weight.

Insofar as the instant case turns on the constitutional issue presented, Mr. Justice Rehnquist reminded just this term that "summary affirmances • • • obviously are not of the same precedential value as would be an opinion of this court treating the question on the merits." (*Edelman* v. *Jordan*, —— U.S. —— 42 U.S.L.W. 4419, 4425 (Mar. 25, 1974).) *Edelman*, itself, is a graphic illustration. There the Court "having • • • had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, disapprove[d]" the holding of three recent summary affirmances, the latest of which was *Sterret* v. *Mother and Children's Rights Organization*, 409 U.S. 809.[2] *(Id.)* This case, like *Edelman*, presents "the first opportunity [for] the Court • • • • to fully explore and treat" a substantial constitutional issue "in a written opinion." (*Id.*) The States' reliance on *stare decisis* here is therefore

[2] The two earlier decisions also disapproved in *Edelman* were *State Dept. of Health and Rehabilitation Services* v. *Zarate*, 407 U.S. 918 and *Wyman* v. *Bowens*, 397 U.S. 49.

as misplaced as was the respondent welfare recipients' reliance on that doctrine in *Edelman*.

Insofar as the instant case turns on the proper interpretation of the Social Security Act, it is equally clear that *Torres* does not foreclose plenary consideration of that question. To ascertain the meaning of the Act it is necessary to consider both §§ 303(a)(1) & (a)(3). (See pp. 18-38 *infra*.) But, in *Torres*, the appellants never even brought § 303(a)(3) before this Court.[3] Thus, *Torres* "lacks the precedential weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon*, —— U.S. ——, 42 U.S.L.W. 4721, 4725 n. 11 (May 15, 1974)), through which the Court has been advised of all the legally relevant issues.[4]

[3] "QUESTIONS PRESENTED

"1. Does the termination of the payment of unemployment insurance benefits to a recipient, previously determined eligible to receive and receiving such benefits, without a prior evidentiary hearing, violate the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

"2. Does the termination of the payment of unemployment insurance benefits, previously determined to be due to a recipient, without the holding of a prior evidentiary hearing on the issue of the recipient's continuing eligibility for such benefits, violate 42 U.S.C. § 503(a)(1) which requires that state unemployment insurance benefit plans must be 'reasonably calculated to insure full payment . . . when due'?" (Jurisdictional Statement in No. 71-5743, 3.)

[4] Further, the Jurisdictional Statement in *Torres* blurred the issue presented in the instant case and in *Crow*. Since Torres himself had never been properly determined initially eligible (see 321 F. Supp. at 435), that case, which was presented as a single class action on behalf of *all* those deprived of unemployment com-

Our understanding that the constitutional and statutory questions implicated here are open is confirmed by the Court's actions in *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, a case in which the three-judge District Court held that the Social Security Act requires an evidentiary pre-termination hearing. (See *Hiatt* v. *Indiana Employment Security Division*, 347 F.Supp. 218 (N.D. Ind.).) If the summary affirmance in *Torres*, which was issued on February 28, 1972, had been intended by this Court to be a definitive ruling to the contrary, the disposition of the appeal in the *Burney* case, which was ruled upon on May 30, 1972, would have been summary reversal. But, instead, this Court set *Burney* down for plenary consideration. (406 U.S. 956.) Moreover, the final disposition in *Burney* was to vacate the judgment and remand the matter for consideration of "whether it had become moot." (409 U.S. at 541-542.) Possible mootness is not a jurisdictional bar to consideration of a case. It is a method of postponing decision of a live and substantial question of law pending litigation that presents that issue in a truly adversary context.

(b) The second major theme in the States' argument that unemployment compensation may be terminated or suspended without an evidentiary pre-termination hearing is that, unlike the welfare recipients before the Court in

pensation without an evidentiary pre-termination hearing, was not focused on the procedural rights of the narrower class of recipients who have *properly* been determined initially eligible for benefits. This is a critical distinction both under the Social Security Act and the Due Process Clause. Only the latter class (which is the class before this Court in the instant case), has a claim to a pre-termination evidentiary hearing under §§ 303(a)(1) & (a)(3), and only that class has a property right which brings the due process clause into play. See pp. 18-43 infra.)

Goldberg v. *Kelly*, 397 U.S. 254, unemployment compensation recipients who have properly been found initially eligibile have no "continuing right to benefits", and thus a cessation of their benefits cannot be characterized as a "termination" or a "suspension." (Br. of Appellants, 14.) The terminology and procedures of the "federal-state cooperative unemployment insurance programs" (*California Human Resources Dept.* v. *Java*, 402 U.S. 121, 125), belie this contention.

The States' premise is that there is no continuing right to unemployment compensation benefits. But in California, for example,[5] after the initial eligibility determination (the "critical point in the California procedure")[6] an eligible unemployed worker is considered by the State to be in a "continued claim" status. (22 Cal. Admin. Code § 1326-4 (b).) He has established a "valid claim" for benefits and consequently has been found eligible to receive a fixed benefit amount for a definite number of weeks. (Cal. Unemp. Ins. Code §§ 1276, 1280, 1281.) In short, following an initial determination, the eligible unemployed worker occupies a position entirely different from the applicant whose entitlement to benefits has never been established. Thus, California draws a sharp distinction between a "new claim for benefits" and a "continued claim." (Compare 22 Cal. Admin. Code § 1326-3 with § 1326-4.) Indeed, § 1326-4(b) provides:

[5] We discuss the California procedures because that is the State in which the *Crow* case (see Motion pp. i-iv, *supra*) arose. The Connecticut terminology and procedures with respect to "continued Claims for Unemployment Compensation" are summarized in the opinion of the court below. (364 F. Supp. at 924-926.)

[6] *Java*, 402 U.S. at 125, and see *id.* at 125-128.

"In order to *maintain* eligibility for filing continued claims for benefits during a continuous period of unemployment, the claimant must file continued claims at intervals of not more than one week, or such other interval as the Department shall require, unless the claimant shows good cause for his delay in filing his continued claim." (Emphasis added.)

And the "continued claim" is filed by simply presenting an IBM card, entitled a "Continued Claim Statement," to a clerk at a "continued claim window."

The States' conclusion that a cessation of unemployment benefits is not a "termination" or a "suspension" (Br. of Appellants, 14), is as unsound as its premise. That conclusion is directly at odds with actual practice. Looking again to the California system, depending on the purported justification for the cut off, a recipient's benefits can be discontinued not only for one week, but for 10 weeks, 18 weeks, or even indefinitely. (See Calif. Unemp. Ins. Code §§ 1260, 1261; 22 Cal. Admin. Code § 1253(c)-2; Cal. Department of Human Resources Development Local Office Manual § 1410.)[7] For allegedly refusing an offer of work, Mrs. Crow's benefit were erroneously terminated for a "penalty period" of 10 weeks. (See *Crow* v. *California Department of Human Resources Development*, 325 F.Supp. 1314, 1320 (N.D. Cal.).) "In light of * * * [the] 'penalty', [the] impact of the finding cannot be confined to the week in which it was rendered." *(Id.)*

Thus, just as in *Goldberg* v. *Kelly, supra,* in the instant case we deal with a *termination* of government benefits. A point-by-point comparison between the welfare and unemployment compensation systems is particularly instructive.

[7] Compare Conn. Gen. Stat. § 331-236.

Both programs require the recipient to make a periodic report concerning his continued eligibility: every two weeks the unemployment compensation recipient must present a continued claim statement in the form of an IBM card; each month the AFDC welfare recipient must complete a detailed questionnaire.[8] In addition, the welfare recipient must also notify the welfare department immediately of any changes with respect to any of the factors covered in the questionnaire.[9] Just as the unemployment compensation recipient must show that he was "available for work," that he "conducted a search for suitable work" and that he did not refuse "suitable work,"[10] so, too, the AFDC welfare recipient must satisfy these same requirements.[11] He must register for work or job training,[12] and report at least every two weeks on his efforts to gain employment.[13] At all times he must be available for and actively seeking work and cannot refuse to apply for or accept a *bona fide* job.[14] In both programs, the failure to comply with reporting and job search requirements results in a cessation of benefits.[15]

The short of the matter is that in both the unemployment

[8] Cal. Welfare and Institutions Code § 11265; Cal. Department of Social Welfare, Public Social Services Manual (hereafter "PSS Manual") §§ 40-181.1-181.3, 44-103.2-103.3; Form WR7.

[9] PSS Manual §§ 40-105.1, 44-201.4; Form WR7.

[10] Cal. Unemp. Ins. Code § 1253(c) & (e), 1257(b).

[11] See generally 42 U.S.C. §§ 602(a)(19), 607(b)(1)(B); Cal. Welfare and Institutions Code §§ 11300, 11201.

[12] PSS Manual §§ 30-151, 41-407.2, 41-440.2.

[13] PSS Manual § 30-151.31.

[14] PSS Manual § 41-407.1.

[15] Compare Cal. Unemp. Ins. Code §§ 1260, 1261; 22 Cal. Admin. Code, § 1253(c)-2; Cal. Dept. Local Office Manual § 1410 with Cal. Welfare and Institutions Code § 11308, PSS Manual §§ 30-155, 41-408, 41-440.

compensation and welfare systems, as a condition precedent to receiving benefits, a claimant must undergo an initial eligibility investigation and thereafter his continued payments are subject only to certain conditions subsequent. As the *Crow* District Court found:

> "Welfare and unemployment compensation schemes both involve an initial decision re: general eligibility, followed by periodic determinations that the applicant's circumstances have not changed in such a way as to affect that first decision • • •." (325 F.Supp. at 1319. See also *Pregent* v. *New Hampshire Dept. of Employment Security*, 361 F.Supp. 782, 792 (D.N.H.) (three-judge court) vacated and remanded to consider mootness, —— U.S. ——, 42 U.S.L.W. 3651 (May 28, 1974).)

2. ***The Social Security Act.*** We now turn to the question presented, and to a demonstration that §§ 303(a)(1) & (a)(3) of the Social Security Act require an evidentiary pre-termination hearing.

(a). The appropriate point of departure is the Chief Justice's succinct description of Congress' overriding goal in enacting a system of unemployment compensation:

> "[T]he Congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible • • • is what the Unemployment Insurance program was all about." (*Java*, 402 U.S. at 135.)

There is no question that the "fair hearing" required by § 303(a)(3) must include such procedural safeguards as notice, an opportunity to obtain representation, confrontation and cross-examination of witnesses, and a decision

based solely on the record at the hearing.[16] And, as *Java* pointed out, § 303(a)(1), which "insures full payment of unemployment compensation when due," was designed "to provid[e] a substitute for wages lost during a period of unemployment." (*Id.* at 130.) Because unemployment compensation is a wage substitute, "to the extent that this was administratively feasible," Congress intended that benefits should be "available precisely on the nearest payday following the termination" from employment. (*Id.*):

> "The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief'. Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. Further, providing for 'security during the period following unemployment' was thought to be a means of assisting a worker to find substantially equivalent employment. • • • Finally, Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry. • • • Early payment of insurance benefits services to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services." (*Id.* at 132-133, footnotes omitted.)

Only prompt and continuous payment of unemployment compensation to eligible recipients "accomplishes the congressional purposes of avoiding resort to welfare and sta-

[16] See U.S. Dept. of Labor Unemployment Insurance Services Office of State Operations, Guide to Unemployment Insurance Benefits Appeals: Principles and Procedures, 2-3 (1970).

bilizing consumer demands; delaying compensation until months have elapsed defeats these purposes." (*Id.* at 133.) And only if the § 303(a)(3) hearing is provided prior to a cut off is the prompt and continuous payment of benefits to those eligible to receive them assured. So long as unemployment compensation may be cut off without such a hearing, the system does not "insure full payment" of benefits "when due." For, the present administrative procedures deprive a substantial number of *eligible* recipients of their benefits during the period Congress intended them to be paid.[17]

The national averages reflecting the performance of the "federal-state cooperative unemployment insurance programs" (*Java*, 402 U.S. at 125), over the past five years show that 28.1% of all appealed decisions terminating benefits are reversed after an evidentiary hearing,[18] and that

[17] As a California legislative study pointed out:

> "It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not four or five weeks thereafter." (Report of the Senate Interim Committee on Unemployment Insurance to the Fifty-Sixth California Legislature, 62 (1945).)

[18] This figure was calculated by totaling the number of appeals by claimants and totaling the number of those appeals which are successful. The latter total was divided by the former to obtain the five year composite percentage. The table below displays the results for each of the last five years:

	1969	1970	1971	1972	1973
California	32.6%	32.9%	32.7%	30.6%	32.8%
Connecticut	29.8%	29.0%	29.2%	25.6%	17.1%
Total U.S.	28.5%	28.9%	28.8%	27.8%	27.1%

Data for respective years was obtained from [March 1970] Department of Labor, Unemployment Insurance Statistics [hereinafter "U.I. Stats"], Table 18a (1969); [March 1971] U.I. Stats,

47.6% of the hearing decisions are rendered more than 45 days after the cut off.[19] In *Java*, this Court concluded that the California procedure challenged there, "which suspen[ded] payments for a median period of seven weeks" violated the Social Security Act since it "fail[ed] to meet the objective of early substitute compensation during unemployment." (402 U.S. at 133.) The foregoing statistics demonstrate that the procedure challenged here is equally at odds with that prime Congressional objective.

(b) Congress intended that evidentiary pre-termination hearings be provided unemployment compensation recipients because the potential for erroneous deprivations of benefits is great and the consequences of such errors are severe. "Rules of procedure are often shaped by the risk of making an erroneous determination. See In re Winship, 397 U.S. 358, 368 (1970) (Harlan, J. concurring)." (*Arnett* v.

Table 18a (1970); [March 1972] U.I. Stats, Table 18a (1971); [May-June 1973] U.I. Stats, Table 18a (1972); [March-April 1974] U.I. Stats, Table 18a (1973).

[19] This figure was obtained by multiplying the percentage of appeals decided after 45 days by the number of appeals for each of the last five years. These totals were summed and divided by the total of the number of appeals for the five year period which provided a composite percentage of appeals decided after 45 days. The following table displays the results for each of the last five years, the percentage listed being that of appeals remaining undecided 45 days after filing:

	1969	1970	1971	1972	1973
California	43.7%	71.2%	47.5%	35.7%	19.4%
Connecticut	26.0%	43.6%	70.6%	95.6%	84.5%
Total U.S.	44.7%	52.9%	51.6%	53.3%	35.5%

Data for respective years was obtained from [March 1970] U.I. Stats, Table 17a (1969); [March 1971] U.I. Stats, Table 17a (1970); [March 1972] U.I. Stats, Table 17a (1971); [May-June 1973] U.I. Stats, Table 17a (1972); [March-April 1974] U.I. Stats, Table 17a (1973).

Kennedy, —— U.S. ——, 42 U.S.L.W. 4513, 4541 (Apr. 16, 1974) (White J. concurring and dissenting).) In *Goldberg* v. *Kelly* the Court therefore noted the "particularly telling" significance of the "welfare bureaucracy's difficulties in reaching correct decisions on eligibility." (397 U.S. at 264 n. 12.) The reversal rate just cited (p. 20, *supra*) demonstrates that the unemployment compensation bureaucracy has the same difficulty. In both instances that difficulty is the direct result of the fact that the cases being decided are those "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." (Cf. 397 U.S. at 268.) The issues most frequently arising in unemployment cases are, in the words of the District Court in *Crow* (325 F. Supp. at 1316), "preeminently factual," and they turn on a "broad fault standard [which] is inherently subject to factual determination and adversarial input," (*Mitchell* v. *W. T. Grant*, —— U.S. ——, 42 U.S.L.W. 4671, 4677 (May 14, 1974)).

(i) Resolution of disputes as to continued eligibility for unemployment compensation normally requires determination of one or more of the following questions: Was the recipient available for work? Did he adequately investigate job prospects at a union hiring hall? Did he display the proper attitude and behavior at job interviews? Did he place improper restrictions on the types of jobs he would consider? Has he taken any action that would preclude an offer of employment? Did he comply with State reporting requirements? Did he make a willful misstatement in order to obtain benefits? Did he hold a job while drawing benefits? Was he physically able to work? Did he receive and refuse an offer for work? If so, was the work "suitable"? Did he receive sufficient information relative to the duties, hours of work and working conditions to enable him to make a determination as to the suitability of the work? Did a prospective job involve a risk to his health, safety or morals? Was he physically fit to perform this particular job? Did the prospective job comport with his prior training and experience? What is the nature of the job market in his customary occupation? Has the period of his unemployment been so long as to require him to accept a less skilled and lower-paying job? Is a prospective job located within a reasonable commuting distance from his home? (See Cal. Unemp. Ins. Code §§ 1253, 1257, 1258, 1259.)

Obviously, answering these questions often entails both sensitive subjective judgments as to the character and honesty of the recipient, and the evaluation and interpretation of third party information. Indeed, third party information may be dispositive. (See e.g., *Crow*, 325 F. Supp. at 1318-1320.) For example, a prospective employer is frequently the source of information regarding such issues as whether a job offer was actually made,[20] the recipient's attitude and behavior during a job interview, the conditions of the job. Outside informers of questionable veracity may, as in the case of welfare terminations,[21] supply "tips" used to disqualify unemployment compensation recipients. This occurs in cases involving a recipient's alleged failure diligently to look for work, or those where it is alleged

[20] See *Wheeler* v. *Vermont*, 335 F. Supp. 856, 858-859 (D. Vt.) (three-judge); *Crow*, 325 F.Supp at 1319 n.3.

[21] In *Kelly* v. *Wyman*, 294 F. Supp. 893, 905 (S.D.N.Y.) (three-judge court) affirmed sub. nom. *Goldberg* v. *Kelly*, *supra*, Judge Feinberg describes how plaintiff Velez was "cut off on the basis of untrue rumors and reports."

that a recipient is secretly working. State personnel other than the interviewing clerk may provide information regarding the violation of instructions they have purportedly given to the recipient. Other cases turn on objective facts which must be proved through third parties; e.g., the condition of the local job market or the availability of child care facilities. As the District Court in *Crow* stated:

> "It is in a case as Mrs. Crow's, where the claimant said she was offered no job, and where the interviewer disagreed, saying he had learned she refused employment, that confrontation and crossexamination are necessary * * *. This adverse finding, based on second hand information which was ultimately proven inaccurate * * * reverse[d] without a fair hearing, the initial determination of eligibility." (325 F. Supp. at 1319-1320.)

In sum, the complexity of the issues and the nature of the relevant evidence make an evidentiary pre-termination hearing necessary to prevent the wrongful deprivation of unemployment compensation.

(ii) The State's soothing assurances "that everything possible is done to treat all claimants as fairly as possible," (Br. for Appellants, 27), is the emptiest of rhetoric. Under the termination procedure challenged in this case, the decision whether an unemployed worker will continue to receive benefits—a decision of critical importance to him and his family—is made at an informal "interview" by an often harried clerk who each week must process the "continued claims" of scores of recipients. (See *Steinberg* v. *Fusari*, 364 F. Supp. at 924-926.)

In *Goldberg* v. *Kelly*, this Court stated that the "decision maker" must be "impartial; he should not have participated in making the determination under review." (397

U.S. at 271.) The procedure challenged here does not honor that basic admonition. The State concedes that the investigating clerk and the decision maker are one. (Br. of Appellants, 34-35.) He may have had a previous long and hostile involvement with the recipient (see Harris, *Claimant Views of Unemployment Insurance Administration in California*, 4 Unemp. Ins. Rev. 2 (1967)), or even have given the very instructions whose issuance or reasonableness are in question. Moreover, he is under no stricture to rest his decision solely on the interview; thus, he may base the ruling on his own background and knowledge or on outside information not revealed at the interview.[22]

Moreover, rather than receiving "timely and adequate notice detailing the reasons for a proposed termination" (*Goldberg* v. *Kelly*, 397 U.S. at 267-268), a recipient first learns of the proposed cut off and the reason therefore at the beginning of his interview. Not having been forewarned of the issues involved, he has been unable to gather evidence or locate and present witnesses, to familiarize himself with his substantive rights as a recipient or to secure representation. This lack of adequate prior notice completely nullifies a recipient's supposed right to present his defense "at a meaningful time and in a meaningful manner." (Cf. Br. for Appellants, 32, citing *Armstrong* v. *Manzo*, 380 U.S. 545, 552.) As the court below painted out:

> "The claimant surely cannot be expected to bring counsel and witnesses to every bi-weekly claims session, on the off chance that a 'seated interview' will result. Nor

[22] In discussing the unemployment compensation clerk's counterpart in the welfare system, the Court in *Goldberg* specifically adverted to the substantial "possibility of honest error or irritable misjudgment" in the latter's decisions. (397 U.S. at 266.)

can the claimant be certain in advance of the subject matter of the interview. While questions involving reasonable efforts at finding work are most common, 'seated interviews' can and do involve numerous other grounds for possible disqualification." (364 F.Supp at 935 n. 25.)

Thus, a "seated interview" does not afford a recipient an opportunity to confront and cross-examine the outside sources whose information may be the basis for his disqualification. Without these historic rights a recipient has no viable means of rebutting the case against him. He is at the mercy of "individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." (*Green* v. *McElroy*, 360 U.S. 474, 497.) The "seated interview" therefore suffers from the same fatal flow as the prison disciplinary proceedings overturned in *Wolff* v. *McDonnell*, —— U.S. ——, 42 U.S.L.W. 5190 (June 26, 1974). In *Wolff* Mr. Justice White emphasized:

> "Part of the function of notice is to give the charged party a chance to marshall the facts in his defense and to clarify what the charges are, in fact. See In re Gault, 387 U.S. 1, 33-34 & n. 54 (1967). Neither of these functions was performed by the notice [which was given]. Although the charges are discussed orally with the inmate somewhat in advance of the hearing, the inmate is sometimes brought before the Adjustment Committee shortly after he is orally informed of the charges. Other times, after this initial discussion, further investigation takes place which may reshape the nature of the charges or the the evidence relied upon. In those instances, under procedures in effect at the time of trial, it would appear that the inmate first receives notice of the actual charges at the time of the hearing

> before the Adjustment Committee. We hold that written notice of the charges must be given to the disciplinary action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense." (*Id.* at 5198.)

Since the present procedures can not withstand examination on the merits, the States seek to deflect attention from their flaws by arguing that the welfare procedures overturned in *Goldberg* v. *Kelly* and its companion, *Wheeler* v. *Montgomery*, were far more inadequate. (Br. for Appellants, 24, 28-29.) But even in this they are entirely mistaken. The procedures challenged here are all but identical to those overturned in *Wheeler* v. *Montgomery;* the only substantial distinction, and it is one which indicates that the *Wheeler* procedures were superior, is that California provided welfare recipients three days prior written notice. (See 397 U.S. at 281.) Moreover, *Richardson* v. *Perales*, 402 U.S. 389, a case dealing with the probative value of hearsay evidence in a social security disability hearing, heavily relied on by the States (Br. of Appellants, 20) is not at all in point. Seven separate passages of the Court's opinion in *Perales* makes it clear that, unlike the welfare termination procedure struck down in *Goldberg* v. *Kelly*, and the unemployment compensation termination procedure here at issue, the social security procedure there involved afforded the recipient ample notice and a full opportunity to subpoena, confront and cross-examine all witnesses. (402 U.S. at 397-410.)

Our insistance that the Social Security Act provides unemployment compensation recipients an evidentiary pretermination hearing is not "slavish adher[ence] to labels." (Cf. Br. for Appellants, 29.) In *Goldberg* v. *Kelly* the Court

noted that such a hearing provides "minimum procedural safeguards, adapted to the particular characteristics of [the] recipients, and to the limited nature of the controversies to be resolved." (397 U.S. at 267.) An evidentiary pre-termination hearing, as this Court has used that term, therefore does no more than is necessary to assure a fair probability that eligible recipients are not deprived of their benefits. Such a hearing does not require the *time consuming formalities* of a full trial, such as adherence to the rules of evidence, the prohibition of hearsay evidence, etc.

(c) Congress insisted on early substitute compensation because in its absence a worker "ordinarily steadily employed," whom the unemployed compensation program was designed to protect, "would otherwise have nothing to spend." (*Java,* 402 U.S. at 131.) As Mr. Justice Black stated, these workers are "of modest means," have "heavy responsibilities," and risk "financial ruin" if there is a "severance of [the] sustaining funds" provided by unemployment compensation. (*Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 239.)

While the unemployment compensation system is financed under insurance principles, "the insurance technique is a means to the welfare end." (Becker, The Inadequacy Of Benefits In Unemployment Insurance, In Aid Of The Unemployed, 80 (1965).) A detailed case by case inquiry into individual need is not required, since that has been established by class studies and since the system "operates in terms of averages." (Becker, *supra.*) But while average rather than individual need is the criterion, the *raison d'etre* of the system is to meet individual needs:

> "It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification, the proposition contains a grave error * * *. If in 1935 we had not judged that there existed a need which individuals were incapable of meeting themselves, unemployment insurance would not have been established." (Becker, *supra* at 81.)

For the typical wage earner who utilizes the unemployment compensation system, it is true today, as it was in 1935, "that there exist[s] a need which [the] individual [is] incapable of meeting [himself]." (Cf. Becker, *supra.*) That wage earner is the sole support for a family of four.[23] His weekly earnings after the deduction of taxes are $119.23.[24] The latest government estimate is that a "lower" budget [25] for such a family is $133.94 per week.[26] Not surprisingly, more than half of these families have liquid assets of less than $500.[27] Thus, the typical unemployment compensation recipient has sufficient assets to tide him

[23] There are 53,296,000 families in the United States and 16,598,000 unrelated individuals. The average family has 3.53 members. (Statistical Abstract of the United States, 1973, p. 40, Table 51.) In 54% of families only one spouse is an income earner. (U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 90, p. 88, Table 32 (1973).)

[24] U.S. Dept. of Labor, Real Earnings in April 1974, Table 1 (May 21, 1974).

[25] The government's "lower" budget provides a bare subsistance. For example, contrary to all probabilities, it assumes that the family has a full stock of all the goods it needs. The budget allows the husband to buy a new pair of work shoes once every 20 months, a new suit once every 4 years, and a new summer suit once every 12 years. There is no allowance for payment of credit charges, although most families own items on time. As an amenity, one movie every three months is allowed.

[26] U.S. Dept. of Labor, Autumn 1973, Urban Family Budgets and Comparative Indexes for Selected Urban Areas, Table A (June 16, 1974).

[27] Mandel, Katona, et al., Surveys of Consumers 1971-1972, Table 5-7, p. 67 (1974).

over only three and one half weeks of uncompensated unemployment. Since the procedures for establishing initial eligibility require approximately three weeks to run their course after the loss of employment (*Java*, 402 U.S. at 126), that worker's resources will be exhausted by the time payments begin. If his benefits are cut off, he and his family are left distitute.

It is no answer to say that such worker may secure welfare. The chief purpose of the unemployment compensation program was to:

> "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels *without the necessity of his turning to welfare or private charity.*" (*Java*, 402 U.S. at 131-132, emphasis added)

Representative Daughton, the Chairman of the House Ways and Means Committee and the floor manager of the Social Security Act, stressed:

> "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief." (79 Cong. Rec. 5486 (1935).)

Since Congress specifically enacted the unemployment compensation program to keep unemployed workers off

welfare, the procedures the States have adopted cannot be justified by the argument that such workers, if wrongly cut off, may seek welfare.

Further, the categorical welfare programs are simply unavailable to the unemployed worker deprived of unemployment compensation. Individuals who have allegedly refused work, or are allegedly unavailable for work, the very reasons for most unemployment compensation cut offs, are automatically ineligible for categorical aid programs. (See 42 U.S.C. §§ 602(a)(19), 607(b)(1)(B).)[28]

(d) The burden of the argument thus far is that evidentiary pretermination hearings are necessary to fulfill the purposes of the Social Security Act. We now show that providing such hearings is "administratively feasible." (Cf, *Java*, 402 U.S. at 125.)

Two preliminary points should be clarified at the outset. For those recipients who accept the state's decision to cut off benefits, nothing more than the present administrative interview is required. An evidentiary pre-termination hearing need be afforded only those who wish to contest the cut off decision. And experience demonstrates that continuing benefits until the evidentiary hearing does not increase the

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[28] Nor is general assistance ("county poor relief") a feasible alternative. Since that form of welfare is locally operated and financed there are many political subdivisions which do not have such a program. Where it does exist it is completely inadequate to provide even a bare subsistence level of support. The average payment is $11.00 per week. (See, President's Commission on Income Maintenance Programs, Background Papers, 279 (1969).) Consequently in *Goldberg* v. *Kelly* the possibility of local general assistance did not prevent the Court from finding that the improper termination of categorical aid could "deprive an eligible recipient of the very means by which to live." (397 U.S. at 254.)

number of recipients requesting such hearings. The District Court's order in *Burney* requiring Indiana to conduct evidentiary pre-termination hearings was in effect from October 27, 1971 until February 21, 1973, the date it was vacated by this Court. Comparing the period January-March 1971 and January-March 1972, there was an 8% decrease (from 829 requests to 764) in the number of recipients seeking a hearing.[29] Moreover, utilizing the same periods of comparison, the percentage of hearings at which the recipients prevailed increased during the period in which the District Court's order was in effect.[30]

Second, this case is not like *Arnett* v. *Kennedy*, where the requirement of an evidentiary pre-termination hearing would have repercussions on substantial nonfinancial government interests. (In *Arnett*, on the prerogative to remove employees whose conduct hinder[s] efficient operation • • • [and whose p]rolonged retention could adversely affect discipline and morale in the work place, foster[ing] disharmony and ultimately impair[ing] the efficiency of an office." 42 U.S.L.W. at 4531 (Powell, J. concurring).) For the States already provide evidentiary hearings. Thus, the issue here is simply whether a recipient who challenges his cut off is to continue to receive benefits pending that hearing. The state's interest is therefore totally financial, and it is *de minimis*.

The present procedures are wholly unnecessary to safeguard the solvency of the unemployment compensation

[29] Compare [Jan.-Mar. 1972] U.I. Stats. Table 18, p. 10 with [Jan.-Mar. 1971] U.I. Stats. Table 18, p. 14.

[30] Compare [Jan.-Mar. 1972] U.I. Stats. Table 18, p. 10 (49.2% success factor) with [Jan.-Mar. 1971] U.I. Stats. Table 18, p. 14 (45% success factor).

fund. In California, for example,[31] the data available for the last full year of operations, 1973, indicate that the estimated loss resulting from payments pending a hearing would be approximately $1,980,405 or .16% of the California Fund's $1,214,457,000 reserves.[32] In 1973, 18,861 recipients were found after a full hearing, to have been properly terminated.[33] If their benefits had been paid pending their hearing, and even if each of them had received the maximum benefit amount of $75.00[34] for four weeks,[35] the total

[31] In this instance we do not utilize national figures because, so far as we have been able to ascertain there are no published figures concerning a critical factor in the equation, the rate of recoupment. We utilize the California experience both because it is the state in which *Crow* and *Java* arose and as a result of those cases approximation of all the necessary data is possible, and because the record in the instant case is silent on recoupment.

[32] [Mar.-April 1974] U.I. Stats., Table 6(b), p. 13.

[33] [Mar.-April 1974] U.I. Stats., Table 18(b) p.30.

[34] In 1973 the maximum benefit amount was $75 (Cal. Unemp. Ins. Code 1280). It should be noted that this figure overstates the projected expense since most claimants are not eligible to receive this maximum weekly benefit amount. The California figures for the two most recent quarters illustrate this fact; in the July-September period the percentage of claimants eligible for the maximum was only 33.2% ([Jan.-Feb. 1974] U.I. Stats., Table 7), and in the last quarter, October-December, the percentage was still below half, 43.2% ([March-April 1974] U.I. Stats., Table 7).

[35] Approximately 60% of the appeals decisions are rendered within 30 days. ([March-April 1974] U.I. Stats. Table 17b, p. 28.) In *Goldberg* v. *Kelly* the Court noted that "the State is not without weapons to minimize • • • increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities." (397 U.S. at 266.) The foregoing figure confirms the Court's confidence and is a further indication (see n. 34) that the cost estimate developed above states a maximum figure. For, in 1965 the median period for a hearing decision in California was 49 days, and in 1969 it was 40.5 days (*Java*, 402 U.S. at 128, n. 6).

overpayment attributable to payments pending a hearing would have been $5,658,300. However, since California recoupes 65% of its overpayments[36] the total unrecovered amount would have been $1,980,405 of its Fund's $1,214,457,000 reserve, or .16%.

The States' attempt to invoke the interests of the "private employers who fund the program" (Br. of Appellants, 24), to support their position. But this identical argument in support of cut offs without a prior hearing was raised and rejected in *Java*. (402 U.S. at 135.) Indeed, its resurrection surpasses understanding in light of Mr. Justice Douglas' demonstration in *Java* that it "is surprisingly disingenuous" (402 U.S. at 135 (concurring opinion)):

> "An employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is not charged with any benefits paid to his former employee pending his appeal. He has no responsibility for recoupment."

Any unrecouped overpayments resulting from the payment of benefits pending an evidentiary hearing to recipients eventually found to be ineligible are charged against the fund, for which all of the state's thousands of employers are taxed on an equal basis.[37] And the employer's financial

[36] *See, Java*, 402 U.S. at 129, n.8. The comparable figure for 1973 is not available.

[37] "Even though the employers in the first instance pay the contribution . . . in the ultimate analysis it tends to rest upon the wage earner." (Statement of Alvin H. Hansen, Chairman of Sub-Committee on Unemployment Insurance, Committee on Economic Security, *Hearings on S. 1130 Before the Sen. Comm. on Finance*, 74th Cong. 1st Sess. 447 (1935); see also colloquy between

interest in that fund is identical to that of any other group of taxpayers composed of less than the general public, such as homeowners paying property taxes or automobile owners paying automobile registration taxes. As this Court pointed out in *Labor Board* v. *Gullett Gin Co.*, 340 U.S. 361, 364:

> "Payments of unemployment compensation were not made to the employees by respondent [his former employer] but by the state out of state funds derived from taxation. True, these taxes were paid employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state."

Moveover, in light of the figures indicating the minimal cost to the Unemployment Compensation Fund of evidentiary pre-termination hearings (pp. 33-34) the possibility of any financial impact on employers as a group is unlikely in the extreme.

The instant case is therefore wholly distinct from *Mitchell* v. *W. T. Grant Company*, 42 U.S.L.W. 4671 and *Dillard* v. *Industrial Commission of Virginia*, —— U.S. ——, 42 U.S.L.W. 4729 (May 15, 1974), both of which involved the competing claims of two private parties to the same private property.

In *Mitchell*, Mr. Justice White framed the interest involved and the question presented as follows:

> "[Mitchell's] basic proposition is that because he had possession of and a substantial interest in the seques-

Senator (later Justice) Black and Frances Perkins, *id.* at 117-18; Note, *Charity* v. *Social Insurance In Unemployment Compensation Laws*, 73 Yale L.J. 357, 361 (1963).)

tered property, the Due process Clause of the Fourteenth Amendment necessarily forbade the seizure without prior notice and opportunity for a hearing. In the circumstances here presented, we cannot agree.

"[Mitchell] no doubt 'owned' the goods he had purchased under an installment sales contract, but his title was heavily encumbered. The seller, W. T. Grant, also had an interest in the property, for state law provided it with a vendor's lien to secure the unpaid balance of the purchase price. [Mitchell's] interest in the property, until the purchase price was paid in full, was no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default and satisfaction of outstanding claims. The interest of Grant, as seller of the property and holder of a vendor's lien, was measured by the unpaid balance of the purchase price.

"Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor * * *. The reality is that both the seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law." (42 U.S.L.W. at 4672-4673.)

Similarly, in *Dillard*, Mr. Justice Powell recognized that the Virginia Workmen's Compensation system:

"operates in a largely voluntary manner through memoranda of agreement between disabled workmen and employers or insurance companies. Compensation is paid out of private funds, in some cases through self-insurance by employers, but for the most part through coverage by private insurance companies." (42 U.S.L.W. at 4729)

In direct contrast, unemployment benefits are paid directly "by the state out of state funds derived from tax-

ation." (*Gullett Gin*, 340 U.S. at 364.) Moreover, unlike workmen's compensation, the state regulates and administers all phases of the unemployment compensation program, investigating all claims for benefits, resolving all eligibility issues without regard to any agreements between private parties, rendering termination decisions and defending such decisions as an adverse party in further administrative and judicial proceedings.

In *Mitchell* and *Dillard* the dilemma facing the Court was that a holding that one private party to the controversy had a right to a prior hearing had the inevitable result of depriving the other of his right to prior hearing. That dilemma is not present where the question is whether unemployment compensation recipients are to be afforded evidentiary pre-termination hearings. As Mr. Justice Douglas noted in *Java*, "regardless of whether unemployment compensation benefits to his former employees are suspended pending his appeal, an employer is assured of a complete opportunity to be heard *before* effective action is taken against him." (402 U.S. at 135; emphasis in original.)

(e) It is therefore apparent that if the congressional purposes embodied in the Social Security Act are to be accomplished §§ 303(a)(1) & (a)(3) can only be read as requiring evidentiary pre-termination hearings:

"Even though [the state] on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds

that [the claimant] benefits were due and could not be summarily suspended due to a deputy's determination on ineligibility. Having been found eligible [initially the claimant] was entitled to benefits until the state afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under § 303(a)(1) of the Social Security Act. See Java, supra 91 S.Ct. at 1355." (*Hiatt* v. *Indiana Employment Security Division*, supra, 335 F. Supp. at 861. See also *Pregent* v. *New Hampshire Department of Employment Security*, 361 F. Supp. at 793-794.)

3. *The Process Clause.* The foregoing argument as to the proper construction of the Social Security Act is, we submit, despositive. But, in addition, it is well settled that in determining the content of procedural regulations such as §§ 303(a)(1) & 303(a)(3) of the Act, the courts look to the context provided by the decisions elaborating the elementary notions of fair procedure contained in the Due Process Clause, as well as to the language, purpose and legislative history of the statutes in question:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those of due process • • • These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." (*Greene* v. *McElroy*, 360 U.S. at 507-508; see also, *Arnett* v. *Kennedy*, 42 U.S.L.W. at 4540 (White, J., concurring and dissenting).)

And due process analysis reinforces the conclusion, manifest in the Act itself, that the cut off of employment compensation without an evidentiary pretermination hearing contravenes the requirements of §§ 303(a)(1) & (a)(3).

(a) The opinions in *Arnett* v. *Kennedy*, reveal that "six members of the Court are in agreement on [the] fundamental proposition" that:

> "to determine the existence of [a] property interest • • • one looks to the controlling • • • statutory [or common] • • • law • • •. [But] the fact that the origins of property right are with the State makes no difference for the nature of the procedures required. While the State may define what is and what is not property, once having defined those rights the Constitution defines due process." (42 U.S.L.W. at 4536 (White, J. concurring and dissenting).)

And as Mr. Justice Powell added, citing *Goldberg* v. *Kelly*, 397 U.S. at 261, 267, so long as the applicable substantive law grants an individual "a legitimate claim of entitlement" it grants him "property" within the meaning of the Due Process Clause. (42 U.S.L.W. at 4530-4531 (Powell, J. concurring).) We have already demonstrated that like welfare recipients, unemployment compensation recipients who have properly been found to be initially eligible have a "legitimate claim of entitlement." The constitutional requirement of due process is therefore applicable.

(b) *Goldberg* v. *Kelly* holds that an evidentiary pretermination hearing is the pre-condition for the cut off of welfare. (397 U.S. at 266-271.)[38] And while *Arnett* and

[38] The States argue that because the informal interview procedure was sufficient to initially establish a claimant's entitlement to benefits it may be used to terminate those benefits once granted. (Br. of Appellants, 29-30.) This sophistic logic overlooks that the calculus of considerations in the two instances is entirely different.

Mitchell establish that an evidentiary pre-termination hearing is not required prior to every deprivation of property, those precedents do not question the *Goldberg* holding. Indeed, *Goldberg* itself distinguished the situation that eventially came before the Court in *Arnett*-discharge from public employment:

> "[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. Sniadach v. Family Finance Corp., 395 U.S. 337. For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239. Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the *discharged government employee*, the taxpayer denied a tax exemption or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." (397 U.S. at 264; emphasis added.)

Under the *Goldberg* analysis "the crucial factor" is whether the loss of an entitlement "may deprive" an

---

At the initial determination the clamiant has no property interest. Once his initial eligibility is established he does. Indeed, the States' argument is as contrary to this Court's decisions as it is devoid of reason. The initial eligibility procedures utilized in welfare parallel those utilized in unemployment compensation. Yet *Goldberg* v. *Kelly* squarely hold the same procedures are not sufficient to cut off those benefits.

eligible recipient "of the very means by which to live while he waits." (See *Arnett*, 42 U.S.L.W. at 4541 (White, J. concurring and dissenting).) The reason for the foregoing distinction between welfare recipients and the "blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption", is that for qualifid recipients, "welfare provides the means to obtain essential food, clothing, housing and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239." (*Goldberg*, 397 U.S. at 264) In the cited portion of *Nash* a unanimous Court had emphasized that the improper termination of unemployment benefits would cause an unemployed worker to "risk financial ruin." (389 U.S. at 239.) In the words of Mr. Justice Black:

> "Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds." (*Id.*)

Thus, in *Goldberg* the Court equated the situation of welfare, and unemployment compensation, recipients. And the foregoing analysis demonstrates that no line of demarcation between the two can be drawn. With the exception of the means test which Congress deliberately rejected for unemployed workers, welfare and unemployment are parallel programs, each providing subsistence level support: welfare for the blind, disabled, aged and children; unemployment compensation for workers unemployed through no fault of their own. And, the typical worker "ordinarily steadily employed" (*Java*, 402 U.S. at 131), whom the unemployment compensation program is designed to protect, is in essentially the same position as his counterpart in the welfare program: First, in both instances their financial

predicament is not of their own making; second, by definition, an eligible welfare or unemployment compensation recipient wrongly cut off is unemployable; and, third, for the individuals each program covers, there is no alternative "form of support" to which the eligible recipient may turn "during the period between the pre-termination and final hearing," (*Arnett*, 42 U.S.L.W. at 4541 (White, J. concurring and dissenting).)[39] As Judge Dunway has stated, "The two programs are intertwined, both provide aid to people unable to work and there is no reason to distinguish them for purposes of this case." (*Crow*, 490 F.2d at 586 (dissenting opinion).)

The short of the matter is that unemployment terminations present perhaps a more compelling case for a prior evidentiary hearing than welfare termination. The factual issues are more complex,[40] the governmental interest in summary adjudication is far less since substantial recoupment of overpayment is available.[41] Like welfare, unemployment benefits are vitally needed, often providing the sole means of subsistence, but unlike welfare, unemployment compensation is an earned "contractual right" upon which Congress intended workers to be able to rely should they become involuntarily unemployed, (*Java*, 402 U.S. at 131).

It follows that the procedural safeguards enumerated in *Goldberg* are applicable here. The opposite conclusion

[39] See pp. 28-31 *supra*.

[40] See pp. 22-24 *supra*.

[41] See pp. 33-35 *supra*. In contrast, Goldberg recognizes that the "benefits paid to ineligible [welfare] recipients pending decisions at the hearing probably cannot be recouped since these recipients are likely to be judgment proof." (397 U.S. at 266.)

would create the intolerable paradox that the unemployment compensation recipient's *earned* right to benefits would be less carefully safeguarded from arbitrary terminations than the welfare recipient's right to benefits. That result would make a hollow mockery of Congress' intent to provide the worker "ordinarily steadily employed" with "security during the period following unemployment." (*Java*, 402 U.S. at 131, 132.)

CONCLUSION

For the above stated reasons the instant case should be remanded to the court below with instructions to order Connecticut to provide unemployment compensation recipients, who have properly been found initially eligible for benefits, and who contest an administrative determination that they are no longer eligible, an "evidentiary pre-termination hearing," as that term is defined in *Goldberg* v. *Kelly*, 397 U.S. 254 and *Wheeler* v. *Montgomery*, 397 U.S. 280.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant,

—v.—

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA and JUAN MIRANDA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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IN THE

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No. 73-848

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant,

—v.—

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Appellees.

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BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAW PROJECT, INC., *ET AL.*

Interest of the *Amici*

The National Employment Law Project, Inc., Community Action for Legal Services, Inc. of New York, the Legal Aid Bureau of Baltimore, the Legal Aid Society of Cleveland, the Legal Services Center of Seattle, the Michigan Legal Assistance Program, the Neighborhood Legal Aid Society, Inc. of Richmond, and Texas Rural Legal Aid, Inc. respectfully request the leave of this Court to file the

accompanying Brief *Amici Curiae*. The consent of the parties to this appeal to the filing of this brief has been obtained.

The *amici* are interested in this case because each of the *amici* is a Legal Services Office funded by the United States Office of Economic Opportunity and each devotes most of its time to the representation of indigent individuals. Indigent clients bring numerous unemployment compensation cases to Legal Services Offices, often after benefits have been terminated without hearing, with the result that Legal Services Offices devote a very substantial amount of time to the representation of indigent unemployment compensation recipients.[1]

The summary termination of unemployment compensation benefits and the ensuing delay pending a fair hearing work a major hardship on these unemployment compensation recipients. Because the average wage in the United States in employment covered by unemployment compensation was but $155.30 per week in 1972,[2] and because, when one becomes unemployed, this income is replaced with a benefit which, in 1972, equalled, on the average, but 35.9% of the earned wage[3] and because even this modest

[1] In Maryland when unemployment compensation recipients receive notice of adverse action they also receive a notice (Form FSA-801) informing them that they may be entitled to free legal assistance, together with the addresses of the offices of the *amicus*, Legal Aid Bureau, Inc., of Baltimore. Approximately 25% of the caseload of the National Employment Law Project is made up of unemployment compensation matters in which it is cooperating with local Legal Services offices.

[2] See United States Department of Labor, Manpower Administration, *Unemployment Insurance Program Letter No. 1251 (Unemployment Insurance Financial Developments, 1972)* at Table 2.

[3] *Id.*

benefit is eliminated by summary benefit terminations, the *amici* frequently find themselves representing desperately poor clients whose benefits have been terminated without a hearing. The problem of these clients is further exacerbated by the long delays in scheduling fair hearings.

The summary termination of unemployment compensation benefits imposes additional financial burdens on those whose financial resources are greatly reduced by unemployment. The additional legal impediment imposed by shifting to the recipient the burden of securing a reversal of a summary adverse decision must not be countenanced in these circumstances. For these reasons the *amici* urge affirmance of the decision below.

Questions Presented

A. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require a fair hearing prior to the termination of unemployment compensation?

B. Does Section 303(a) of the Social Security Act which requires payment of unemployment compensation "when due" and the provision for fair hearings require a fair hearing prior to the termination of unemployment compensation?

C. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, is the present Connecticut "seated interview" procedure an inadequate procedure for terminating unemployment compensation?

Counterstatement of the Case

The State of Connecticut, like other states, participates in the federal-state program of unemployment compensation established by Title III of the Social Security Act, 42 U.S.C. §§501 *et seq.* The Act provides that states participating in the program must include provision for:

> "(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; [and]
>
> • • •
>
> "(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." Social Security Act §303(a) [42 U.S.C. §503(a)].

The State of Connecticut has established procedures for making initial determinations of entitlement to unemployment compensation.[4] See Conn. Gen. Stat. ch. 567, §31-241 (1958), as amended, Conn. P.A. 339 §14 L. 1974. Once a recipient has been determined to be eligible for compensation, however, that recipient may have his compensation terminated by Connecticut without a pre-termination hearing.

In approximately 60 to 70 percent of the terminations, a recipient's compensation is terminated for reasons not related to his previous employment, but because of a determination that the recipient has failed to be "able" to and "available" for work or to "make reasonable efforts to obtain work," Conn. Gen. Stat. ch. 567, §31-235(2) (1958) (App. 39a).[5] In these cases, which typically arise when the recipient reports to pick up his check, the recipient is given a "seated interview" as soon as a question as to his eligibility is raised (App. 38a). If the result of the seated interview is adverse to the recipient, his compensation check is withheld. There is no advance notice of the specific factual issues to be raised in this interview; no notification of the right to representation by counsel (or by anyone else); no notice of whatever opportunity may exist to present favorable witnesses and documents; and no opportunity to confront or cross-examine hostile witnesses (App. 38a, 184a, 185a-186a, 205a and 206a).[6] After this proceed-

[4] Effective October 1, 1974, this procedure for making initial determinations will be further formalized. The Connecticut Unemployment Insurance Law was amended to provide that the "determination of eligibility by the Administrator or an Examiner shall be based upon evidence presented in person or in writing at a hearing called for such purpose." Conn. P.A. 339 §14, L. 1974 amending Conn. Gen. Stat. ch. 567, §§31-241 (1958). The Sponsor of the amendment indicated that it was intended to modify the Labor Commission procedure which provides "a notice to a claimant which says that he must appear at his preliminary hearing in order to establish his eligibility for unemployment compensation" Conn. State Sen. Proc. at 129 (May 7, 1974). The modification was designed to prevent reliance on telephone information to disqualify claimants at this initial stage and require the Commission to rely on presentations made in person or on the form the Commission sends to employers when the recipient attempts to establish eligibility. *Id.* The defendant-appellant has yet to promulgate regulations implementing this amendment.

[5] See 364 F. Supp. at 925, n. 7.

[6] There are two exceptions to this denial of a pre-termination hearing where the termination issue involves allegations of a recipient's failure to be able to and available for work or to make reasonable efforts to obtain work. The first typically arises where the recipient's previous employer raises an issue of the recipient's refusal of a job offer by that employer. The second arises where allegations that a claimant has refused to accept a job referral come from an employee of the Connecticut State Employment Service. In these two situations, Connecticut requires that the person making the allegation on which termination might be based be present at the seated interview. See, 364 F. Supp. 925-926. The form of these procedures, however, is not at issue in the instant case.

ing, in which benefit payments may be terminated, the recipient must resort to the appeal process in which a hearing is eventually held.[7] It was this seated interview procedure which was used to terminate the compensation payments of appellees.

Each of the appellees was initially determined eligible for benefits but was later denied benefits in a "seated interview" on the grounds of failing to make reasonable efforts to obtain work. Each requested a hearing and each received a hearing and a hearing decision after a time ranging from approximately six weeks, in the case of appellee Miranda, to six months, in the case of appellee Steinberg. Two of the three appellees were eventually found to have been eligible for benefits denied as a consequence of the seated interview (App. 39a-42a).

[7] In Connecticut there was, when this action was filed, a single level of appeal within Connecticut's Department of Labor from these "seated interview" terminations. Conn. Gen. Stat. ch. 567, §31-242, *as amended*, Conn. P.A. 339 §15, L. 1974. This appeal process was intended to extend to the recipient the fair hearing required by the Social Security Act, 42 U.S.C. §503(a)(3). The hearing was conducted by a Commissioner of the Connecticut Department of Labor. Conn. Gen. Stat. ch. 567, §31-242, *as amended*, Conn. P.A. 339 §15, L. 1974. The State Act was amended (see note 5 *supra*) to provide for a two-stage appeal procedure, the first of which would provide the hearing. Conn. P.A. 339 §§1, 2, 4, 9, 10, L. 1974. In the future "referees" will provide the hearings now conducted by the Commissioners. Conn. P.A. 339 §§1, 10, L. 1974.

Summary of Argument

There are four alternative bases for affirming the decision of the Court below: (1) Due process requires that fair hearings, with adequate provision for notice, preparation, representation by counsel, confrontation, cross-examination, and an impartial hearing examiner the scope of whose inquiry and decision must be limited by the specific contents of the notice, be held prior to termination of unemployment compensation. (2) The Social Security Act, which requires payment of unemployment compensation "when due," requires such hearings prior to benefit terminations where determinations not based on such hearings are erroneous in a substantial number of cases and there is a long delay between such determinations and a subsequent hearing decision. (3) The Social Security Act, which requires a "fair hearing," requires that such hearing be held prior to termination of unemployment compensation. (4) The decision of the Court below, which allowed the State of Connecticut a number of alternative ways of bringing its procedures into conformity with the requirements of due process, is fully justified in view of the inadequacy of Connecticut's present procedures and the ensuing delay prior to hearing decisions.

As to the first basis for affirming the decision below it becomes apparent through application of the traditional two-step due process analysis that unemployment compensation, as a statutory entitlement and as a contractual right, is a property interest protected by due process; and that in the process of weighing the competing interests a full due process hearing prior to the termination of com-

pensation is required to protect the recipient's crucial interest in early, adequate compensation.

Even more than welfare assistance, which was recognized as a property interest by this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), unemployment compensation is a statutory entitlement grounded in federal and state statutes. More also than the many contractual rights already recognized as property interests by this Court, unemployment compensation payments, financed by insurance tax payments levied on employers, come to unemployed workers as a "contractual right."

In weighing the interests to determine the form of the hearing required by due process, it first becomes apparent that the State has only the slightest interest in summary benefit terminations since any benefit payments made pending a prior hearing must be paid not by the State but by the Connecticut Unemployment Trust Fund, which is financed wholly by employer payments. It is apparent that individual employers have no interest to protect because their accounts may not be charged for erroneous payments. By contrast the workers' need for compensation during periods of unemployment is most substantial. This was recognized by Congress and has been acknowledged by this Court, see *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971). It is also specifically recognized by Connecticut in its provision of dependents' allowances to unemployed workers, and is accentuated by the unavailability of welfare assistance for unemployed workers in Connecticut. This need is further accentuated by the eighteen-week delay between the termination of benefits and the hearing decisions which occurs in 90% of the cases, and the high reversal rate of those determinations in the hearings. Balancing these

interests requires provision of a full due process hearing prior to the termination of unemployment compensation.

As to the second and third bases for affirming the decision below, it is apparent that Congress had a three-fold purpose in mind when it enacted Title III of the Social Security Act: providing the worker with subsistence income during unemployment, stabilizing the economy by maintaining the workers' purchasing power, and allowing maximum ability to search for work.

To accomplish these goals, Congress provided in §§303 (a)(1) and (3) [42 U.S.C. §§503(a)(1) and (3)] that no state program would be certified by the Secretary of Labor unless it provided for payments "when due" and a "fair hearing" for all individuals denied unemployment compensation. In *California Department of Human Resources Development* v. *Java, supra,* this Court construed the phrase "when due" in §303(a)(1) to mean "at the earliest stage of unemployment that such payments were administratively feasible. . . ." 402 U.S. at 131.

The Court below, while considering whether Connecticut's present procedure allowing for the summary termination of compensation violated §303(a)(1), concluded that it did not in reliance on this Court's summary affirmance in *Torres* v. *New York State Department of Labor,* 405 U.S. 949 (1972). However, in so doing, it failed to attribute full significance to two important facts: the reversal rate of determinations of ineligibility rendered in a seated interview and the delay that occurs before a hearing decision. Both are significant because together they serve to deny compensation to many eligible recipients during the period that Congress intended them to receive compensation. A high reversal rate coupled with a long delay before a decision on appeal means that claimants incorrectly deter-

mined ineligible are without compensation during a substantial part of their periods of unemployment, if not all of it, contrary to Congress' intent that payments be made during unemployment.

The phrase "fair hearing," as used in the Social Security Act, has been administratively interpreted to require provision of prior hearings under six Titles of the Social Security Act. Common sense suggests that Congress intended to act consistently and that the phrase must have the same meaning in all Titles of the Act. Likewise, the traditional meaning ascribed to the phrase "fair hearing" establishes that Congress intended that the hearing occur prior to compensation terminations.

As to the fourth basis for affirming the decision below, the present Connecticut procedure for benefit terminations, such as those imposed on appellees, is defective in failing to provide notice, opportunity to prepare, opportunity for representation, opportunity for confrontation, opportunity for cross-examination and an impartial hearing officer. The Court below, in viewing this against the long delay before these due process requirements were provided, allowed the state four optional methods of remedying the defects of its procedures: (1) providing prior hearings, (2) providing hearings more rapidly, (3) increasing the due process protections available in the present termination procedure, or (4) paying benefits pending a hearing subject to recoupment. Thus the State was allowed to adopt any one or combination of these remedies. The infirmities of the present procedures, which often result in erroneous decisions and are only reviewed after a long delay, obviously required some remedial action and the Court responded with a fair range of alternative courses of action.

ARGUMENT

A. *Introduction*

The issues raised on this appeal are not novel to the lower federal courts or to this Court. In the past three years, four unanimous three-judge district courts[8] and one single-judge district court[9] have held that fair hearings prior to unemployment compensation terminations are required while one court of appeals, by a split decision,[10] and one three-judge district court, also by a split decision,[11] have held that prior hearings are not required. The Court below, while not requiring a prior hearing, did find Connecticut's present procedure to be inadequate to meet the requirements of due process.

Prior to the noting of probable jurisdiction in the instant appeal, three of the above cases were acted upon by

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[8] *Pregent* v. *New Hampshire D.E.S.*, 361 F. Supp. 782 (D.N.H. 1973) (three-judge court), *vacated and remanded for determination of mootness*, 42 U.S.L.W. 3651 (U.S. May 28, 1974); *Hiatt* v. *Indiana Employment Security Division*, 347 F. Supp. 218 (N.D. Ind. 1971) (three-judge court), *remanded for determination of mootness, sub nom., Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1972); *Wheeler* v. *Vermont*, 335 F. Supp. 856 (D. Vt. 1971) (three-judge court); *Foard* v. *Ohio Bureau of Employment Services*, No. C 70-302 (N.D. Ohio 1971) (three-judge court).

[9] *Crow* v. *California Department of Human Resources*, 325 F. Supp. 1314 (N.D. Cal. 1970), *rev'd*, 490 F.2d 580 (9th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3439 (U.S. Dec. 28, 1973) (No. 73-1015).

[10] See note 9, *supra*.

[11] *Torres* v. *New York State Dept. of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1970) (three-judge court), *vacated and remanded*, 402 U.S. 968 (1971), *previous decision adhered to*, 333 F. Supp. 341 (1971), *aff'd mem.*, 405 U.S. 949 (1972), *rehearing denied*, 410 U.S. 971 (1973).

this Court: two of the unanimous three-judge district court decisions requiring prior hearings were remanded by this Court for determinations as to mootness,[12] while the split three-judge district court decision in *Torres* v. *New York State Department of Labor* denying a prior hearing was summarily affirmed by this Court.[13]

Although this Court has never spoken on the merits of the unemployment compensation prior hearing issue, this Court's summary affirmance in *Torres* has not been without significance in the instant case. Constrained by a Second Circuit ruling requiring that full precedential weight be given to a summary affirmance by this Court,[14] the Court below found itself unable to hold that Connecticut's denial of a prior hearing violated the Social Security Act. However, the Court did distinguish *Torres* on the facts [primarily with regard to the inordinate delay in Connecticut between the date of the termination and the date of the fair hearings (see 364 F. Supp. at 934)], in applying the due process weighing test and concluded that due process requires more than Connecticut now extends to unemployment compensation recipients. The Court provided the State with a set of alternative modifications which would bring the State procedures into compliance with the requirements of due process. In reaching this result, the Court noted that were it "writing on a somewhat cleaner slate, [it] would have little difficulty in rejecting the reasoning of the district court in *Torres*, and concluding, largely for the reasons so ably set out by Judge Oakes in *Wheeler* v. *State of Vermont*

[12] See *Pregent* and *Burney* cited in note 8, *supra*.

[13] See note 11, *supra*.

[14] See *Doe* v. *Hodgson*, 478 F.2d 537, 539 (2nd Cir.), *cert. denied*, 414 U.S. 1096 (1973), cited by the three-judge district court below, 364 F. Supp. at 931.

[335 F. Supp. 856 (D. Vt. 1971) (three-judge court)], that the Connecticut unemployment compensation procedures here challenged conflict with both the Fourteenth Amendment and the Social Security Act." 364 F. Supp. at 931. This Court of course is not constrained by its summary affirmance in *Torres*, as was the court below. [Recently, this Court rejected a series of three summary affirmances in reaching its decision in *Edelman* v. *Jordan*, —— U.S. ——, 94 S. Ct. 1347, 1359 (1974).]

Unconstrained by *Torres*, this Court may now undertake a fresh analysis of the constitutional and statutory provisions relating to prior hearings in unemployment compensation. A fair reading of those provisions compels the conclusion that prior hearings are required in unemployment compensation. But at the very least, the modest requirements of the judgment of the Court below should be affirmed.

B. *The Due Process Clause of the Fourteenth Amendment and Section 303(a) of the Social Security Act Require a Fair Hearing Prior to the Termination of Unemployment Compensation*

1. The Termination of Unemployment Compensation Without a Prior Hearing Violates the Due Process Clause of the Fourteenth Amendment

In *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), this Court held that the determination of due process requirements in any particular context involves a two-step analysis: In order "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." 408 U.S. at 570-571. Second, once an interest is found to be protected by due process, a "weighing process" is necessary to determine the form of hearing required by

due process to protect that particular interest. 408 U.S. at 470.

Application of this analytical approach to the instant case requires the conclusions: (a) that unemployment compensation, a statutory entitlement and contractual right, intended by Congress to be paid immediately "when due," is a property interest warranting due process protection; and (b) that when the interests of the State and employers are balanced against those of the unemployed worker the scale tips heavily in favor of the worker.

a. *Unemployment Compensation Is a Property Interest Protected by the Due Process Clause of the Fourteenth Amendment*

In *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), this Court defined the parameters of those interests whose nature is sufficient to invoke the protections of due process. Noting that a person must have "more than an abstract need or desire . . . more than a unilateral expectation [for the property] . . . " the Court stated that the person "must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. The Court continued:

> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in *Goldberg* v. *Kelly, supra,* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." 408 U.S. at 577.

Like welfare benefits, unemployment compensation is a public benefit program. Both welfare and unemployment compensation are joint federal-state programs administered primarily by the states;[15] and like welfare entitlement, entitlement to unemployment compensation is grounded in state statutes defining eligibility for compensation.[16] Another aspect of unemployment compensation is that it is to be paid to workers during a specific period of time—the period during which they are unemployed.[17]

Beyond its characteristics as a public statutory entitlement, unemployment compensation also has private con-

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[15] For example, 42 U.S.C. §§601 *et seq.*, provide for federal financial assistance to the states for the state administration of the AFDC Program so long as the states comply with the federal statutory conditions set forth therein.

Similarly, 42 U.S.C. §§901 *et seq.* and §§1101 *et seq.* provide for federal financial assistance to the states for the state administration of unemployment compensation so long as the states comply with the federal statutory conditions set forth therein.

[16] For example, AFDC benefits in Connecticut must be paid to any applicant where the following state statutory conditions of eligibility are met: The applicant seeking benefits for a dependent child must be unable to furnish suitable support therefor in his own home; each dependent child must be supported in a home in Connecticut and an applicant for aid must not have made an assignment or transfer of property for the purpose of qualifying for the award. Conn. Gen. Stat. ch. 302, §17-85 (1958), *as amended* (Supp. 1973). Further, a dependent child must be a needy child under the age of 18 who has been deprived of parental support or care due to death, continued absence from home, or mental or physical incapacity of a parent, and the dependent child must be living with a qualified relative in a place of residence maintained by one or more such relatives at his or their own home. Conn. Gen. Stat. ch. 302, §17-82 (1958), *as amended* (Supp. 1973).

Similarly, earned unemployment compensation in Connecticut must be paid to any applicant who meets the statutory conditions for eligibility. See Conn. Gen. Stat. ch. 567, §31-235.

[17] See generally, Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. at 214 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935).

tractual characteristics flowing from its nature as a wage substitute. To the Congress that created it, unemployment compensation was not charity; rather it came to an unemployed worker as a "matter of right." [18] In fact, it was presented to Congress as a program that would create a "contractual right." [19] More recently Congress has characterized unemployment compensation as an "earned monetary entitlement." [20] Behind these characteristics is the reality: unemployment compensation payments are made from the Unemployment Trust Fund which is financed by employer contributions.[21] The right to such payments is thus also grounded in a contract—the employment relationship.

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[18] "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of our population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief."

79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton, Chairman of the House Ways and Means Committee).

[19] Report of the Committee on Economic Security, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 1321-1322 (1935).

[20] See Report of the Senate Finance Committee on the Employment Security Amendments of 1970, S. Rep. No. 91-752, 91st Cong., 2nd Sess. 24 (1971). and Report of the House Ways and Means Committee on the 1970 Employment Security Amendments, H.R. Rep. No. 612, 91st Cong., 1st Sess. 19 (1969), both relating to unemployment compensation amendments to the Social Security Act.

[21] Initially, in nine states, not only the employers but also the employees themselves made contributions toward the unemployment compensation fund. See, E. Teple and C. Nowacek, *Experience Rating: Its Objectives, Problems and Economic Implications*, 8 Vand. L. Rev. 376, 380, n. 8 (1955), a practice still followed in two states: New Jersey, see N.J. Stat. Ann. 43:21-7(d)(1) (1962), *as amended* (Supp. 1974); and Alabama, see Code of Ala., Title 26, §202 (1940), *as amended* (Supp. 1974).

This Court has extended due process protection to both statutory and contractual property interests. The former type of property interest, such as statutory entitlements to welfare benefits, have regularly been accorded due process protection. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); cf. *Flemming* v. *Nestor*, 363 U.S. 603 (1960) (Old Age Benefits).[22] Recent examples of the latter are the rights conveyed by installment sales contracts for such items as household furnishings at issue in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) and the wage payments at issue in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Unemployment compensation being both a contractual right and a statutory entitlement is unquestionably a protected property interest.

The nature of this property interest is such that it is inextricably related to the time at which it is available. It is an entitlement to receive payments at a certain time, *i.e.*, during unemployment. See p. 28, *infra*. The property interest, by its very nature, is destroyed without due process if, once payments are found to be due, they are terminated during unemployment without a hearing first being held. There can be no doubt that unemployment compensation is a property interest protected by due process and that that interest is an interest in receiving payments at a specific time.

In fact, this Court has recognized in unemployment compensation an interest sufficient to require the protection

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[22] Writing for the Court nearly fifteen years ago in *Flemming* v. *Nestor*, 363 U.S. 603 (1960), Mr. Justice Harlan stated:

"[T]he interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." 363 U.S. at 611.

of due process. Four years ago, it used entitlement to unemployment compensation as a springboard to find in welfare entitlement a property interest sufficient to invoke due process requirements:

> "Relevant constitutional restraints apply as must to the withdrawal of public assistance benefits as to disqualification for unemployment compensation." *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970).

Certainly the converse of this proposition is equally valid.

b. *The Due Process Weighing Test Requires a Full and Fair Hearing Prior to the Termination of Unemployment Compensation*

Since unemployment compensation is a property interest sufficient to invoke the protections of due process, it is necessary to apply the "weighing process" to determine the form of the hearing required by due process to protect that interest. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 570 (1972). The determination as to form generally includes provision for adequate notice, for presentation of evidence, for confrontation and cross-examination, for right to counsel or other representation, for an impartial decision-maker and for a decision based upon evidence. *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970).

While this Court, following a long line of authority, has held that the hearing is always required prior to deprivation of a property interest, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972),[23] more recent holdings suggest that the question

[23] This Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, —— U.S. ——, 42 U.S.L.W. 4963 (U.S. May 15, 1974) recently acknowledged the validity of this *Fuentes* analysis by holding that postponement of notice and hearing is justified only in extraordinary situations.

of the proper timing of the hearing is also to be resolved in the weighing process, see *Mitchell* v. *W. T. Grant Company*, —— U.S. ——, 94 S. Ct. 1895, 1902 (1974); *Arnett* v. *Kennedy*, —— U.S. ——, 94 S. Ct. 1633 (1974) (Opinion of Justice Powell, 94 S. Ct. 1633 at 1651). Here, the choice of one rule or the other has no effect on the outcome: since there is a property interest, the *Fuentes* rule requires a prior hearing; since the interest of the recipient so far outweighs any competing interests, the later cases also require a prior hearing.

In applying the weighing test in the instant case, particularly as to the timing of the hearing, substantial guidance is provided by reviewing the competing interests accepted or rejected by this Court in several recent due process decisions. In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (holding that notice and a hearing must be provided prior to garnishment of 50% of several weeks of a wage earner's wages), this Court concluded that the interests of a wage earning family in not being "driven to the wall" by the loss of wages outweighed the interests of the state in simply preferring a later hearing.

One year later, in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), this Court held that welfare recipients could not be deprived of their statutory benefits without a full due process prior hearing (including provision for notice, confrontation and cross examination, representation, an impartial decision-maker, and a decision based upon the evidence). Again the Court concluded that the financial need of the recipients outweighed the interests of the state in avoiding increased administrative costs and in paying its own monies to judgment proof recipients who may be ineligible for the statutory benefits.

The following year, in *Bell* v. *Burson*, 402 U.S. 535 (1971) (holding that a judicial hearing on the question of potential liability for an automobile accident was required before the license of an uninsured motorist could be temporarily suspended) this Court found that the interests of the holder of a driver's license in retaining that license outweighed the interests of the state in protecting an injured third party from the possibility of an unsatisfied judgment and in avoiding the additional administrative expense of providing the prior judicial hearing on the issue of liability.

And last Term in *Arnett* v. *Kennedy*, —— U.S. ——, 94 S. Ct. 1633 (1974) (holding that a full evidentiary hearing was not required prior to the suspension of a disruptive and unsatisfactory employee), Justices Powell and Blackmun pointed out in their concurring opinion that the employee's interest in uninterrupted employment was satisfied by the notice and partial hearing procedures provided prior to suspension and by the back pay award available upon reinstatement, and that the employee's interest in a full-scale prior due process hearing was outweighed by the government's interest and the public's interest in maintaining employee efficiency and discipline ("Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency." 94 S. Ct. at 1651).

Two principles relevant to the instant case may be drawn from the foregoing cases: First, the need for the property interest must be concrete just as the government's failure to provide full due process procedures prior to the taking must also be based on a concrete need. Second, government efforts to avoid projected administrative expenses incurred

in providing the requirement of due process cannot alone outweigh the concrete needs of those with protected interests.

Closer examination of the interests to be weighed here compels the conclusion that the unemployed worker's need is great and virtually identical to that of the welfare recipient, while the competing interests are minimal. Looking first to the State's interests, it is apparent that the State cannot assert avoidance of administrative costs here when similar interests were outweighed by the driver's need in *Bell* v. *Burson, supra*, and the wage earner's need in *Sniadach* v. *Family Finance Corp., supra*. Here, the State would not even pay whatever increased administrative costs, if any, would occur.[24] Nor can the State assert a drain on its treasury from erroneously paid compensation, an interest which was truly present but insufficient in *Goldberg*, when compensation payments here emanate not from the State but from the employer-funded Unemployment Trust Fund.[25] Further, erroneously paid compensation may be recouped or set off from workers who subsequently survive their period of need and rejoin the labor force,[26] compare *Goldberg* v. *Kelly*, 397 U.S. 254, 266, where the recipients were assumed to be judgment-proof.

Nor do the employers have an interest sufficient to outweigh that of the recipient. First, assuming that there might be some slight increase in the general unemployment

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[24] 42 U.S.C. §502(a) provides for federal "payment to each state which has an unemployment compensation law [in such amounts as are] necessary for the proper administration of such law." The federal government is not harmed because it pays these amounts from a tax on employers.

[25] Conn. Gen. Stat. ch. 567, §31-263 (1958).

[26] Conn. Gen. Stat. ch. 567, §31-273 (1958), *as amended*, Conn. P.A. 339 §33, L. 1974.

compensation tax rate as a consequence of requiring prior hearings, the vague, generalized interest that all employers have, collectively, in maintaining a low contribution rate cannot outweigh the specific and direct harm to the individual recipient resulting from long, often erroneous, benefit denials. Under Conn. P.A. 536 §4, L. 1973, which establishes contribution rates, there is a possible general tax rate adjustment of from —.4% to a maximum of +.9% of taxable payrolls that affects the Fund as a whole. Employers have no more interest in this adjustment to the over-all contribution than a member of the general public has in any tax increase. Moreover, the ability of the State to recoup erroneous payments greatly reduces the possibility of rate increases resulting from provision of prior hearings.[27]

Second, the individual employer whose contribution rate will not be increased by benefit payments, see Conn. P.A. 536 §4, L. 1973, *amending* Conn. Gen. Stat. ch. 567, §31-225 (1958), does not have any real interest in delaying benefit payments pending a hearing. If the award was correct in the first place, there is obviously no harm to the employer. If it was erroneous, the employer is not harmed since the state may not charge benefits for which the recipient was ineligible to his account. See Conn. P.A. 536 §5, L. 1973. As Justice Douglas observed in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 135 (1971):

> "An employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is not charged with any benefits paid to his former employee pending his appeal."

The same is true in Connecticut.

[27] *Id.*

Unlike the recipient, the employer does not suffer immediate termination of an important, and, for many recipients, exclusive source of income. Thus, unlike the creditors in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and in *Mitchell* v. *W. T. Grant Co.*, —— U.S. ——, 94 S. Ct. 1895 (1974),[28] the employers here have no direct interest in the termination of benefits without prior hearings.

By contrast, the need of unemployed workers for their compensation is substantial. While it is true that eligibility for compensation is not based on a formal means test, as is welfare, it is also apparent that unemployment compensation, enacted during the Great Depression, is designed to remedy the frequently destitute circumstances of newly unemployed workers and their families. The severe

[28] The interests of the creditor in *Mitchell* v. *W. T. Grant Co.*, —— U.S. ——, 94 S. Ct. 1895 (1974), are particularly inapposite to the minimal interests of the individual employers in the instant case. In *Mitchell*, this Court noted four factors which weighed heavily in swinging the balancing process toward protecting the creditor's interests. First, the *Mitchell* creditor's interest was in merchandise whose resale value "will steadily decline as it is used [by the buyer] over a period of time;" thus the creditor's interest could be "irretrievably eroded" during even a short period of buyer possession pending a fair hearing. 94 S. Ct. at 1900. Second, the Court noted that, "there is the real risk that the buyer . . . will conceal or transfer the merchandise to the damage of the seller." 94 S. Ct. at 1900. By contrast, neither of these financial considerations are present in the instant case since the employer is concerned at most with a possible small future tax increase. See p. 22, *supra*. The third factor in *Mitchell* was the minimal "risk that the writ will be wrongfully issued by a judge." 94 S. Ct. at 1901. Here, however, not only is there no pretense of judicial safeguards, but moreover the record discloses that approximately 19–26% of the terminations *are wrong*. See note 35, *infra*. And, finally, in *Mitchell*, the buyer could "immediately have a full hearing . . . thus cutting to a bare minimum the time of creditor or court supervised possession." 94 S. Ct. at 1901. Again, by contrast, there is no immediate hearing here but rather an eighteen-week delay in ninety per cent of the cases. See note 32, *infra*.

financial need which serves as the basis for the unemployment compensation program was specifically recognized by this Court in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130-132 (1971) and in *Nash* v. *Industrial Commission*, 389 U.S. 235, 239 (1967), (where this Court emphasized that termination of unemployment compensation would cause the recipient to "risk financial ruin.")[29] It was also recognized by the Court below:

> "Recent statistics suggest that the average unemployment compensation recipient is hardly well-off. In 1970, the average wage covered by unemployment insurance in the United States was $141.09; in Connecticut, it was $149.76. The average weekly benefit in that year in the United States was $50.31, or 35.7% of the average covered wage; in Connecticut, it was $60.26, or 40.2% of the wage. United States Department of Labor, Handbook of Unemployment Insurance Financial Data 1938-1970 at 139 (1971)." 364 F. Supp. at 936, n. 26.

The argument that the resulting need is of less consequence because those found ineligible may be eligible for welfare, see *Torres* v. *New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971), is particularly

[29] In *Java*, this Court stated:

"A kind of 'need' is present in the statutory scheme for insurance, however, to the extent that any 'salary replacement' insurance fulfills a need caused by lost employment." 402 U.S. at 130.

The Court also stated:

"Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." 402 U.S. at 131-132 (footnote omitted).

inapposite in this situation. First, it is a highly questionable public policy to force those eligible for unemployment compensation by virtue of long attachment to the work force to become welfare recipients. See *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 131 (1971). It was precisely to avoid this result that Congress established the unemployment compensation program. See 79 Cong. Rec. 5468 (1935), quoted at note 29, *supra*. Second, Congress enacted the Social Security Act as a single comprehensive package of economic benefits. Different benefits were established for different purposes. The comprehensive scheme is frustrated to the extent that states, to avoid paying one type of benefit, adopt policies that require reliance on other types of benefits available under the Act. But this is the inevitable result of forcing reliance on welfare for long periods during which unemployment compensation is due, a particularly inefficient policy where erroneously withheld unemployment benefits will eventually be repaid, often long after the period of need expires. Finally, many unemployed workers are unable to qualify for welfare benefits in Connecticut. Since Connecticut does not participate in the Aid for Dependent Children-Unemployed Parent Program,[30] this form of welfare assistance is altogether unavailable to the unemployed. This means that families headed by unemployed males would not be eligible for federally-assisted welfare benefits in Connecticut.

[30] See 364 F. Supp. at 934. It should be noted that Connecticut by failing to participate in the AFDC-U Program places itself with the majority of the states. Recent statistics on AFDC-U participation reveal that of fifty-four jurisdictions, thirty do not participate while only twenty-four do. H.E.W. Social Rehabilitation Service, "Public Assistance Report, #50: Characteristics of State Public Assistance Plans, General Provisions—Eligibility, Assistance, Administration" (1973).

Further evidence of the financial need of unemployed workers and their families is found in the statistics on dependents' allowances, a flat grant payment for each dependent, which in Connecticut is added to the unemployment compensation payments normally received by the worker.[31] During the period July, 1972 to June, 1973, 149,895 new unemployed workers established their eligibility for benefits in Connecticut. *United States Department of Labor, Unemployment Insurance Statistics* Table 9, p. 16 (March-April, 1974). Of these, 33.6% received dependents' allowances. *Id.* at p. 16. Of those receiving such allowances, over 60% had two or more dependents and more than 40% had three or more dependents. *Id.* Table 10(a), p. 18. Dependents' allowances during this period totalled $7,929,164. *Id.* Table 11, p. 19. Connecticut's unemployment compensation program can hardly be characterized as one where compensation is granted on a basis divorced from need.

But the most compelling fact to be balanced in the weighing process may well be the eighteen weeks that elapse between a request for a hearing and a decision based on the hearing in 90% of the cases in Connecticut.[32] This long

[31] Conn. Gen. Stat. ch. 567 §21-234 (1958). See generally Becker, *Adequacy of the Benefit Amount in Unemployment Insurance* 53 (Upjohn Institute for Employment Research, May, 1961).

[32] This statistic and others were related in detail by the Court below:

> "The record indicates that of the 461 intrastate appeals disposed of in Connecticut during December of 1972, fully 414 took at least 101 days between the time an appeal was filed and the date a final decision was reached. Put in percentage terms, this means that about 89.8% of all appeals took over 100 days to decide. And, the figures indicate that 61.4% of all appeals take over 125 days to dispose of, while 29.5% consumed over 150 days before the Commissioner's decision. Figures from other months strongly suggest that the December figures are not unrepresentative." 364 F. Supp. at 934 (footnotes omitted).

delay altogether frustrates the intent of Congress "to give prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over until they get back to their old work or find other employment without having to resort to relief.'" *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 131 (1971) (footnote omitted).

It is during the period of unemployment that the worker and his family experience the most severe level of deprivation. A subsequent lump sum payment of illegally withheld compensation, eighteen weeks later and at a time when the worker and his family may have extricated themselves from their poverty through new employment, does little to assist the unemployed worker and his family during their period of greatest need, and even less to satisfy the legislative intent of providing early compensation to the worker. But that is part of the definition of this property interest; it is an interest in receiving benefits while unemployed. This interest can be protected only by requiring a full and fair due process hearing prior to the termination of unemployment compensation.

2. The Termination of Unemployment Compensation Without a Prior Hearing Violates the "When Due" and "Fair Hearing" Requirements of the Social Security Act and Frustrates the Purposes of Congress in Establishing the Unemployment Compensation Program

a. *The "When Due" Requirement and the Congressional Purpose in Enacting the Social Security Act Require That Recipients Be Granted a Hearing Prior to Termination of Their Unemployment Compensation*

The Court below rejected the proposition that Connecticut's seated interview system violated the requirement of

42 U.S.C. §503(a)(1) that compensation be paid "when due," on the grounds that it was bound by this Court's summary affirmance in *Torres* v. *New York State Department of Labor*, 405 U.S. 949 (1972), see 364 F. Supp. 922, 937. Although this Court of course is not bound by its summary affirmance in *Torres*,[33] and thus may examine this issue anew, it is noteworthy that the Court below failed to attribute proper significance to two important facts in the instant case. First, the large number of reversals of Connecticut's seated interview determinations indicate that large numbers of unemployed workers to whom compensation is "due" are denied that compensation for periods which, because the delay in reaching most hearing decisions in Connecticut is greater than the average period of unemployment, are often as long as or longer than the period of eligibility (*i.e.*, the duration of unemployment or the entire period "when due").[34] Second, the purpose of the unemployment compensation program is frustrated both by long delays before payment of benefits and by the erroneous benefit terminations.

In establishing unemployment compensation, Congress sought to accomplish three objectives in the hope of lessening the deleterious effects of rising unemployment. Congress sought, first, to provide the unemployed worker with a subsistence income during his periods of unemployment. H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935); S. Rep. No. 628, 74th Cong., 1st Sess., 12 (1935); Statement of

[33] See discussion at p. 13, *supra*.

[34] The average length of unemployment covered by unemployment compensation in 1973 in Connecticut was 9.3 weeks. Connecticut State Department of Labor, *Department Bulletin* at 14-15 (Spring, 1973). By contrast, 90% of the cases reach a decision based on a hearing after 18 weeks have expired. See note 32, *supra*.

Federal Relief Administrator and Member of the Committee on Economic Security, Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 214 (1935); Report of the Committee on Economic Security, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1321-1322 (1935); see also *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130-132 (1971). A denial of compensation during a substantial portion of a worker's period of unemployment does not accomplish this purpose.

Second, Congress established the unemployment compensation program to stabilize the economy by maintaining the purchasing power of the unemployed worker. See H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935); *Java, supra*, 402 U.S. at 132-133. The intent of Congress to stabilize the economy was expressed by Senator Robert F. Wagner, sponsor of the Social Security Act, before the Senate Committee on Finance:

> "The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry . . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the seaway of prosperity." Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 2 (1935).

Obviously, "danger threatens" during the period of unemployment, not when it passes. Without payment of compensation during this period, neither the worker nor the economy can benefit.

Third, Congress through the unemployment compensation program sought to assist the unemployed worker in his search for employment. Commenting on this purpose of

the Social Security Act before the House Ways and Means Committee, the Federal Emergency Relief Administrator stated that:

> "[T]his [Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. *We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash.*" Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. at 214 (1935) (statement by Harry L. Hopkins, Federal Emergency Relief Administrator) (emphasis added).

During each week that compensation is denied, the unemployed worker's search for employment is inhibited.

In light of this three-fold purpose, this Court construed §303(a)(1) of the Act and concluded that:

> "[T]he word 'due' . . . means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes . . . of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. It seems clear therefore that [this] procedure, which suspends payments . . . after an initial determination of eligibility has been made, is not 'reasonably calculated to insure full payment of unemployment compensation when due.'" *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 133 (1971).

In *Java*, this Court found that termination of benefits upon an employer's appeal was very likely to deprive an eligible recipient of his benefits during his period of unemployment. 402 U.S. at 133-134. Similarly, the high reversal rate here[35] results in a substantial number of claimants being deprived of benefits to which they are rightfully entitled for a period which is longer than the average period of unemployment of 9.3 weeks in Connecticut. See note 34, *supra*.

In *Torres* v. *New York State Department of Labor*, 333 F. Supp. 341 (1971), *aff'd mem.*, 405 U.S. 949 (1972), *rehearing denied*, 410 U.S. 971 (1973), the Court concluded that, as the result of New York's benefit termination procedure, benefits could not be said to be "due" for purposes of 42 U.S.C. §503(a)(1) because the agency had determined them not to be "due." But this reasoning, if it is accepted, has no application here where so many of the seated interview decisions adverse to recipients are erroneous and benefits *are* due. Likewise, the delay in making hearing decisions means that recipients in Connecticut are forced to bear the risk of possible error during their unemployment. If there is a strong congressional policy favoring early payment of benefits, it would seem that benefits properly would be determined not to be due only in the ultimate, relatively error free hearing now provided by Connecticut.

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[35] The following figures were noted by the court below while discussing Connecticut's reversal rates:

> "For the period of July, 1971 to June 1, 1972, there were 6534 claimant appeals, and 1706 of those were resolved in favor of claimants for a reversal figure of about 21.6%. In the period from July, 1972 to October, 1972, there were 769 reversals out of 2959 claimant appeals, or about 26.0%. In the three-month period from January, 1973 through March, 1973, there were 1759 claimant appeals, and 342 reversals, or a rate of about 19.4%." 364 F. Supp. at 936, n. 28.

Thus it is only after the "fair hearing" required by Section 303(a)(3) of the Social Security Act that benefits can be terminated because no longer due.

As this Court stated in *California Department of Human Resources Development* v. *Java, supra*:

> "Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible that must be regarded as what Congress was trying to accomplish." 402 U.S. at 130.

Consequently, any administrative procedure which unnecessarily postpones the receipt of compensation by eligible claimants frustrates "what Congress sought to accomplish." As California's procedure considered in *Java* was deficient in this respect, so too is Connecticut's.

To remedy this defect and to accomplish the objectives of the Social Security Act, the recipient of unemployment compensation must be afforded timely payments. This treatment can be achieved only by a hearing prior to termination to insure that all eligible recipients receive payments "when due," as Congress intended.

b. *Congress Intended That Recipients of Unemployment Compensation Be Provided With a Hearing Prior to Termination of Their Compensation*

As enacted, Title III of the Social Security Act specifically requires that states provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. §503(a)(3). Likewise, provision was

made in Titles I, IV-A, and X of the Act for fair hearings[36] in the benefit programs established by those Titles. The fair hearing provisions of these Titles and of the more recently enacted Titles XIV, XVI and XIX have been interpreted by the United States Department of Health, Education and Welfare ("H.E.W.") to require *prior* hearings that "meet the due process standards set forth in the United States Supreme Court decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)." 45 C.F.R. §205.10(a)(1)(ii) (1973).

Under these programs, in "cases of intended action to discontinue, terminate, suspend or reduce assistance," [37] the state or local agency must provide timely and adequate notice,[38] an opportunity for a hearing,[39] an impartial decision-maker,[40] opportunity for presentation of the recipient's case by the claimant or his representative[41] and opportunity for confrontation and cross-examination of adverse witnesses.[42] H.E.W. regulations also require that, in situations involving questions of fact, benefits be paid until a decision based on a hearing is rendered.[43]

This measurement of the state hearings established under the "fair hearing" requirement of the various Titles of the Social Security Act against the standards of due process

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[36] See §2(a)(4), 42 U.S.C. §302(a)(4) (old age assistance); §402(a)(4), 42 U.S.C. §602(a)(4) (aid to dependent children); §1002(a)(4), 42 U.S.C. §1202(a)(4) (aid to the blind).

[37] 45 C.F.R. §205.10(a)(4).

[38] *Id.*, §205.10(a)(4)(i) (1973).

[39] *Id.*, §205.10(a)(5).

[40] *Id.*, §205.10(a)(9).

[41] *Id.*, §205.10(a)(13)(ii).

[42] *Id.*, §205.10(a)(13)(vi).

[43] *Id.*, §205.10(a)(6)(i).

established in *Goldberg* v. *Kelly, supra,* is in consonance with the standards by which hearings were traditionally measured at the time Congress passed the Social Security Act. At the time of that enactment, it had been traditionally held that, for a hearing to comport with the requirements of due process, it must be held prior to the deprivation of property. See, *e.g., United States* v. *Illinois Central R.R.,* 291 U.S. 457 (1934) (hearing necessary before rate change by Interstate Commerce Commission can be effective); *Londoner* v. *City and County of Denver,* 210 U.S. 373 (1908) (due process hearing must be held prior to assessment of taxes by state administrative board); *Windsor* v. *McVeigh,* 93 U.S. 274 (1876) (due process hearing must be held prior to issuance of decree of condemnation); see also *McVeigh* v. *United States,* 78 U.S. (11 Wall.) 259 (1870).

There is no indication that Congress intended anything other than conformity with traditional notions of due process when it required a fair hearing for all persons denied unemployment compensation. As this Court stated in *Shields* v. *Utah Idaho Central Railroad Co.,* 305 U.S. 177 (1938), quoting from *Morgan* v. *United States,* 298 U.S. 468, 480 (1936):

> "The requirement of a 'hearing' has obvious reference to the 'tradition of judicial proceedings . . .' [T]he manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." 305 U.S. at 182.

Traditionally a due process hearing occurs before the property in question is forfeited. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 570, n. 7 (1973); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). There is little reason to believe

that Congress required fair hearings in unemployment compensation without requiring those hearings to comply with the requirements of due process. Indeed, as noted by this Court in *Greene* v. *McElroy,* 360 U.S. 474 (1959), in matters of statutory interpretation it is assumed "that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." 360 U.S. at 507. Moreover, Congress must have intended to act consistently. Since there is certainly no indication that Congress intended the nature of the "fair hearings" established under each of the Titles of the Social Security Act to differ depending upon which federal agency administered the program, H.E.W.'s constitutionally correct interpretation of the fair hearing requirement of Titles I, IV-A, and X, which were enacted at the same time as Title III, must also be adopted with respect to the Title III "fair hearing" provision.

C. *The Court Below Properly Determined Present Connecticut Procedures to Be Inadequate Under the Due Process Clause of the Fourteenth Amendment*

The Court below declined to require the State of Connecticut to provide a full prior hearing. Instead, the Court provided the State with various alternative means of bringing its practice into conformity with the requirements of due process. The Court held that the State could, alternatively, provide expedited *de novo* hearings, provide initial hearing procedures meeting minimum standards of fairness or, where rapid and fair *de novo* review would be unduly burdensome, pay the disputed benefits while reserving the right to set such benefits off against future compensation payments, see 364 F. Supp. 922, 937-38. It also noted that the State could do away with the seated interview and pay benefits pending a hearing, see 364 F. Supp. 922, 936 n. 27.

In short, the Court found that the procedural inadequacy of Connecticut's present termination procedure, coupled with the long delays incident to the holding of hearings, resulted in a violation of due process. The Court did not adopt a rigid rule requiring full-scale due process prior hearings in all circumstances.

The Court reviewed the present procedure for benefit terminations and concluded that the procedure did not result in discharge of due process obligations because: (1) there was virtually no advance notice of the "seated interview" or of the precise issue which would be raised; (2) there was no opportunity to prepare arguments or present supporting witnesses and documents; (3) there was no opportunity to confront and cross-examine adverse witnesses; (4) there was no opportunity to consult counsel; and (5) the fact-finding examiner, not being limited by a precise notion of the charges against the recipient, could base his decision on a wide range of rationales not necessarily related to the issue originally presented to the recipient. See 364 F. Supp. 922, 935. Coupled with the inadequacy of this initial termination procedure, the Court relied upon the hearing decision delay as a further source for its concern with the treatment Connecticut accords recipients in the first instance. See 364 F. Supp. 922, 933-934. It also bears repeating that a very substantial proportion of the non-due process determinations are eventually reversed. On the basis of these factors and a balancing of the interests of the State and the recipient, the Court properly concluded that the State should make some of the adjustments it suggested.

In the circumstances, it would have been difficult for the Court to do otherwise. The record is replete with evidence that complex, subjective factual issues frequently arise at

the "seated interview" which results in benefit termination (App. at 54a-58a, 77a-82a, 117a-118a); see also 364 F. Supp. 922, 936. Yet this interview is hopelessly inadequate because:

(1) The unemployed worker is subjected to this interview without adequate advance notice although one of the basic requirements of due process is fair and adequate notice of the charges made, see, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 267-268 (1970). The recipient has no notice of the issues to be raised until he reports to the unemployment compensation office and even then receives no precise notice of the issues involved. 364 F. Supp. 922, 935. Moreover, the fact finder may go beyond the record of the interview in making his decision. 364 F. Supp. 922, 935. Since there are no fixed standards by which even the examiner can measure the accuracy of his determinations (App. 76a-77a) there is no possibility of adequate notice to the claimant as to the specific issues which may be raised against him.

The appellant attempts to find a remedy for this defect in the fact that the recipient has general knowledge that he must report every two weeks, Brief of Appellant at 16. Yet this notice is altogether inadequate because it is not until after the recipient arrives at the unemployment compensation office that he is informed of any specific alleged inadequacy in his search for work. As the State concedes, new factual issues can be raised when the recipient reports, Brief of Appellant at 14.

(2) Recipients are not provided with adequate opportunity for representation by counsel, although representation is also a basic requirement of due process, see, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 270-71 (1970) ("Counsel

can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient"); cf. *Powell* v. *Alabama,* 287 U.S. 45, 68-69 (1932). While it is true that there is no specific prohibition on representation by counsel here, Brief of Appellant at 21, neither is there any specific notice to the recipient that he has the right to counsel. It is not too speculative to suggest that the typical worker would not think of his need for counsel in the few minutes between his being informed that he must participate in a seated interview and the time that he moves to the head of the line for that interview. Even if he did think of it, there is no requirement that he be given time to obtain counsel before the interview. Appellant's claim that a worker may, if he chooses, bring counsel with him every time he reports, Brief of Appellant at 18, is not only patently ridiculous as suggested by the Court below,[*] but it also concedes the total absence of notice in the State procedure. What has been said of the opportunity to retain counsel is also true for the other elements of due process that require adequate opportunity for advance preparation such as the presentation of friendly witnesses and the presentation of documentary evidence.

(3) Recipients are also denied the right of confrontation and cross-examination, another necessary element of due process, see, *e.g., Goldberg* v. *Kelly,* 397 U.S. 254, 270 (1970) ("Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses

[*] The Court below soundly rejected this claim by stating:

> "The claimant surely cannot be expected to bring counsel and witnesses to every bi-weekly claims session on the off chance that a 'seated interview' will result." 364 F. Supp. at 935, n. 25.

relied on by the department"); *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 103-104 (1963); *Greene* v. *McElroy,* 360 U.S. 474, 496-497 (1959). The State's denial of confrontation and cross-examination is most vividly illustrated by the examiners' practice of gathering information against recipients by telephoning so-called uninterested employers, Brief for Appellant at 19, a practice which the State concedes provides "no opportunity for confrontation by the claimant." *Id.*

(4) Finally, the record also demonstrates the absence of an impartial decision maker, another basic requirement of due process, see, *e.g., Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970) ("of course, an impartial decision maker is essential"); *Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973); *In re Murchison,* 349 U.S. 133, 138 (1955); *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 45-46 (1950). In the Connecticut procedure, the seated interview examiner, although denoted a "Fact Finding Examiner," sits in the position of an inquisitor who seeks to elicit information which might indicate that the worker is not eligible for his compensation (App. 38a). Indeed, the lack of impartiality in this procedure is suggested by the State's own reference to the subsequent fair hearing procedure provided by the Unemployment Compensation Commission, which is described as "a completely independent entity separate and apart from the defendant and the Employment Security Division," Brief of Appellant at 5.

No doubt these procedural infirmities in the Connecticut seated interview have much to do with the high rate of error in decisions based on seated interviews. When they are viewed from the perspective of the recipients who must

wait long periods of time before being given the opportunity to fairly present their cases and endure the consequent hardship, the holding of the Court below emerges as a modest response to a clear-cut denial of due process.

As noted above, a balancing of the competing interests of the recipient and the employer tips decidedly in favor of the recipient. See, pp. 18-27 *supra*. *Amici*, like the Court below, have difficulty discerning what interests the State could possibly have sufficient to justify refusal to adopt that Court's proposals. Surely long delays in benefit payments do not help the State. Surely, too, an increase in the procedural proprieties at the seated interview would not be unduly burdensome. These points are necessarily true *a fortiori* since it has already been shown that the burdens incident to holding a prior hearing are not sufficient to outweigh the interest of the recipient in early and correct benefit determinations. Finally, to the extent the State follows the suggestion of the Court below that the State may comply with the requirements of due process by processing requests for hearings more expeditiously, the State will reduce the amount of benefits paid to recipients pending hearings.

In view of the hardships imposed by the present Connecticut procedures, the inadequacy of those procedures to meet minimal requirements of fairness, and the inconsequential burden imposed on the State by the decision of the Court below, the Court's modest proposals for securing due process rights to recipients are most appropriate and should be affirmed by this Court.

CONCLUSION

For the foregoing reasons the decision of the Court below should be affirmed.

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